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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1695

ELECTRI-FLEX COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

No.

ELECTRI-FLEX COMPANY,

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VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Electri-Flex Company* respectfully prays that a Writ of Certiorari issue to review the Order of the

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* Hereinafter Petitioner will be referred to as "the Company", and District 122, International Association of Machinists and Aerospace Workers, AFL-CIO will be referred to as "the Union". Also, the National Labor Relations Board, will be referred to as "the Board", and the Administrative Law Judge will be referred to as "the ALJ". Finally, the National Labor Relations Act (as amended) will be referred to as "the Act."

United States Court of Appeals for the Seventh Circuit in its Cause No. 78-2506, decided November 14, 1979.

OPINIONS BELOW

The unpublished Order of the Court of Appeals in this cause is set forth in the Appendix to this petition, commencing at page 71, *infra*.

The Decision and Order of the Board is set forth in the Appendix to this petition, commencing at page 65, *infra*, and is reported at 238 NLRB No. 97 (1978).

The Decision and Order of the ALJ is set forth in the Appendix to this petition, commencing at page 1, *infra*.

JURISDICTION

The Order of the Court of Appeals for the Seventh Circuit sought to be reviewed is dated November 14, 1979. By Order dated January 10, 1980 the Court of Appeals denied the Company's Petition for Rehearing en banc. (A-85)* The Judgment of the Court of Appeals is dated January 28, 1980. (A-86)

Jurisdiction is conferred upon this Court to review the Decision and Order here in question by Writ of Certiorari as provided in Title 28 United States Code Par. 1254(1).

* References hereinafter to the Appendix bound with this Petition are shown as "A-..... ." References to the transcript of the hearing appear as "Tr. ..... ." References to the Company's Exhibits appear as "R. Ex. ....." while references to Counsel for General Counsel's exhibits appear as "G. C. Ex. ..... ."

QUESTIONS PRESENTED

1. Whether the Board, in adopting the decision of the ALJ abandoned its lawful role as impartial referee of the bargaining process and assumed the unlawful role of a partisan in favor of the Union?

2. Whether the Board unlawfully attempted to pass judgment on and dictate the substantive provisions of the collective bargaining agreement in an effort to give the Union what it wanted, rather than that which would evolve from the normal interplay of economic forces?

3. Whether the finding of the Board that the Company failed to bargain in good faith by making unacceptable proposals to the Union, is in conflict with *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952) and *Gulf States Manufacturers, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd on rehearing en banc July 10, 1979, 598 F.2d 896?

4. Whether the Court of Appeals, which expediently adopted the findings of fact of the Board and failed to review the record in detail, has "grossly misapplied" the substantial evidence rule of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)?

5. Whether the Board's finding that the Company engaged in surface bargaining and failed to bargain in good faith in violation of Sections 8(a)(5) and (1) of the Act is supported by law and by substantial evidence on the record as a whole?

STATUTES INVOLVED

The National Labor Relations Act, Section 8(a), Title 29 United States Code Par. 158(a), provides in relevant part as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

The National Labor Relations Act, Section 8(d), Title 29 United States Code Par. 158(d), provides in relevant part as follows:

> "(d) for the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession* * * *" (Emphasis added)

STATEMENT OF THE CASE

I. Introduction

This is not a routine substantial evidence case where the employer disagrees with the weighing of the record by the Court of Appeals and asks this Court to conduct its own review. This is a unique case because (i) the ALJ and Board rejected evidence introduced by the Company as indicative of good faith bargaining, the form and content of which evidence has previously been approved by this Court, and (ii) this error was compounded by the Court of Appeals by its failure to consider the record. Although the Company repeatedly directed the court to this evidence in its Brief, Reply Brief and Petition for Rehearing, the Court of Appeals stated that such evidence had not been introduced by the Company.

The Company is not requesting that this Court review the voluminous record herein in its entirety. By reviewing the Order of the Court of Appeals (A-71 *et seq.*) and only a small portion of the record (Tr. 878-919, R.Ex. 20-29; Tr. 1045-1058, R.Ex. 44-46), this Court can determine whether the ALJ and Board improperly rejected relevant evidence of good faith bargaining contrary to prior decisions of this Court, whether the Board is improperly forcing the Company to make concessions to the Union and whether the Court of Appeals conducted the required review of the record.

II. History Of Negotiations

The Company is a manufacturer of flexible, electrical conduit located in Roselle, Illinois. At all times relevant to this proceeding, it employed between 60 and 100 employees. Prior to the RC petition filed by the Union

on June 26, 1975, the Company had no experience with this or any other Union. The Union won the representational election held August 7, 1975 and was certified as the collective bargaining representative of the employees on August 15, 1975. (Tr. 957, 960-961)

Between September 26, 1975 and August 4, 1976, representatives of the Company and Union held twelve collective bargaining meetings, each of which generally consumed the better part of a normal work day. (Tr. 791) The Company met with the Union whenever requested to do so. As the Board admitted in its brief to the Court of Appeals, the parties negotiated and reached agreement on numerous proposals such as grievance and arbitration, seniority, promotion and transfer, lay-off and recall and over-time; all substantial issues in collective bargaining. (Board Brief, p. 59) However, the parties were unable to reach agreement on wages, Union security, management rights and contract duration. The Union insisted on a general wage increase for all employees, the amount of which it escalated at the last meeting of August 4, 1976, its own management rights clause, a union shop which it modified to maintenance of membership at the meeting of July 14, 1976 and a contract term of three years.

Although the Company was unwilling to grant a general wage increase it did present an economic package which would have increased total compensation for most employees. In addition, the Company adhered to its management rights proposal, continued its offer of check-off of union dues and its proposal first offered in January, 1976, that the contract expire December 31, 1976. The employees struck the plant during the period of August 16 to August 20, 1976. (Tr. 838) Many employees returned to work during the strike and all

employees returned within a few days after the strike ended.

During August, 1976, the Union filed an unfair labor practice charge, and, subsequently, the Regional Director issued a complaint charging that the Company had failed to bargain in good faith because of its adherence to the disputed proposals, and, in addition, because of its original proposal concerning union access to the plant.[1]

In a prior proceeding, the Union filed unfair labor practice charges alleging violations of Sections 8(a)(1), (3), (4) and (5) of the Act. After complaint issued and a hearing was held, the Board found that such violations had occurred. The Company filed a Petition for Review, and the Court of Appeals enforced the Board's Order. *Electri-Flex Co. v. NLRB*, 570 F.2d 1327 (7th Cir. 1978) This Court denied the Company's Petition for Writ of Certiorari. 439 U.S. 911 (1978)

III. The Decisions Below

At the hearing before the ALJ, the Company sought to establish that its proposals on management rights and union security were not at all unusual, but rather could be found in many collective bargaining agreements. In addition, the Company attempted to prove that it had a reasonable basis for its proposals concerning wages and contract duration.

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[1] The Company's position on union access to the plant was cited in the complaint by the Regional Director even though the parties had reached agreement on this subject early in the negotiations. Counsel for the General Counsel did not raise this issue at the hearing. However, the Court of Appeals included this proposal in its Order as further evidence of a failure to bargain in good faith. (A-83)

Although the ALJ allowed the Company to present evidence in the form of expert testimony and exhibits (Tr. 878-919; R.Ex. 20-29) which showed that other unions had accepted the same or similar proposals concerning union security and management rights, he repeatedly stated on the record that the fact that other unions had accepted such proposals was not relevant to the issue of whether the Company had bargained in good faith. (Tr. 899-902) The ALJ, however, refused to allow the independently conducted wage surveys of the geographic area where the plant was located and covering similar jobs and skills to be admitted into evidence. The Company had relied on these surveys in deciding not to grant a general wage increase. (R.Ex. 44-46, Tr. 1045-1058)

The ALJ found that the Company had failed to bargain in good faith by making contract proposals which it knew were unacceptable to the Union. (A-56) In reaching this decision, the ALJ cited *Gulf States Manufacturers, Inc.*, 230 NLRB No. 81, (1977) which, subsequently, was refused enforcement in *Gulf States Manufacturers, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd on rehearing en banc, 598 F.2d 896 (1979).

The ALJ's decision was routinely affirmed by the Board, and the Company petitioned the U.S. Court of Appeals for the Seventh Circuit to review the Board's Order. The Court of Appeals specifically found that the Company made no attempt to show that its proposals were reasonable and distinguished *Gulf States* on the premise that, in contrast, the employer in that case showed its proposals were reasonable. The court's previous decision in *NLRB v. Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979) was cited as precedent for its Order in the instant case.

ARGUMENT

I.

THE BOARD'S FINDING THAT THE COMPANY FAILED TO BARGAIN IN GOOD FAITH BY MAKING PROPOSALS WHICH WERE UNACCEPTABLE TO THE UNION CONSTITUTES AN ABANDONMENT OF THE BOARD'S ROLE AS IMPARTIAL REFEREE AND AN UNLAWFUL INTRUSION INTO THE COLLECTIVE BARGAINING PROCESS IN FAVOR OF THE UNION.

In adopting Section 8(d) of the Act, which states in relevant part that the obligation to bargain in good faith ". . . does not compel either party to agree to a proposal or require the making of a concession . . ." 29 U.S.C.A. Section 158(d), Congress sought to promote the policy of free collective bargaining. On numerous occasions, this Court, in furtherance of that policy, has interpreted the above statutory provision as prohibiting the Board from compelling concessions or otherwise sitting in judgment upon the substantive terms of collective bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952); *H. K. Porter Company, Inc. v. NLRB*, 397 U.S. 99, 104-106 (1970).

Most recently, this Court has interpreted Section 8(d) as making ". . . *crystal clear* the intention to leave the parties *entirely free of any government compulsion to agree to a proposal or even reach an agreement.*" (Emphasis added) *Carbon Fuel Company v. United Mine Workers of America, et al.*, 48 U.S.L.W. 4059 (No. 78-1183, Dec. 10, 1979). Thus, as the Act is presently drawn, a union which is weaker than the employer may not be able to secure what it wants at the bargaining table. *H. K. Porter Company, Inc.*, 397 U.S. at 103-104, 109.

In the instant case, the Board did judge the substantive content of contract proposals when it held that the Company had failed to bargain in good faith because its proposals concerning wages, union security, management rights and contract duration were unacceptable to the Union. It follows that the Company cannot comply with the Board's Order without "improving" its offers on the several disputed issues, and, therefore, making a "concession" which under Section 8(d) of the Act and the decisions of this Court it is not required to do.

Further support for the impropriety of the Board Order herein is the fact that the prior decision on which the Board relied, *Gulf States Manufacturers, Inc.*, 230 NLRB No. 81 (1977), was denied enforcement in *Gulf States Manufacturers, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd on rehearing en banc July 10, 1979, 598 F.2d 896. The court in *Gulf States* cited with approval the decision in *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978). In both cases, the courts refused to enforce the bargaining orders and chastised the Board for engaging in blatant partisanship in violation of previous decisions of this Court.

In *Tomco*, the parties never were able to agree on wages, management rights, sick leave, union security, dues check-off and no-strike and arbitration clauses. Also, the union repeatedly stated that it would accept nothing short of a union shop and the company insisted on an "enumerated" form of management rights clause. The court found no indication of bad faith by the employer and stated at 567 F.2d 871, 882:

> "While we would accept that some of the terms are harsh . . . that does not give the Board or the courts the power to strike them."

The court in *Tomco*, at 567 F.2d 871, 883 disapproved of the theory underlying the Board's findings, saying:

> "The Board's approach is best illustrated when it condemns the company's final offer as 'terms which no self-respecting union could be expected to accept' . . . (citations omitted) . . . The utility and appropriateness of a 'self-respecting union' standard are still doubtful. As an analytic tool, the phrase seems rather better suited to conclude inquiry than to advance it. . . . Thus, it comes perilously close to determining what the employer should give by looking at what the employees want."

The proposals of the union and the company in *Gulf States* were similar to those in the instant case. The court in *Gulf States* found no evidence of bad faith bargaining on the part of the employer and, at 579 F.2d 1298, 1321, stated:

> "It is evident that, for all practical purposes, the Board has substituted itself for the Union at the bargaining table in the following particulars, among others. It has approved what the Union wants and has rejected what the Company is willing to give . . . *By its decision, the Board has attempted to force the Company to make concessions when the law does not require the Company to do so* . . . These partisan actions of the Board show that it has abdicated its role as referee of the bargaining process and has assumed the role of judge of what provisions the bargaining agreement should contain . . . *If there is any principle in labor law that is well settled and firmly established by statute and by the decisions of the courts it is that the Board has neither the authority nor the power to determine, decide, or dictate the substantive terms or conditions of a collective bargaining agreement.*" (Emphasis added)

As in *Tomco* and *Gulf States*, the Board in this case has injected itself as the third party at the bargaining table, sitting on the Union side of the table. This im-

proper intrusion into the collective bargaining process, in an effort to aid the Union in obtaining more favorable contract proposals, has upset the statutory scheme under which collective bargaining disputes are to be resolved in accordance with the natural forces of "economic warfare" (*NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960)) and the relative "bargaining strengths of the parties." *H. K. Porter Co. v. NLRB*, *supra*, at 108. This Court, once and for all, should inform the Board that it does not have the authority to make such intrusions.

II.

THE BOARD, IN REFUSING TO CONSIDER THE COMPANY'S EVIDENCE THAT ITS CONTRACT PROPOSALS WERE REASONABLE, HAS FAILED TO ADHERE TO A PRIOR DECISION OF THIS COURT.

While an employer cannot obstruct the bargaining process by proffering extreme contract proposals and refusing to modify its position, *an employer can adhere to reasonable proposals* under Section 8(d) of the Act whether or not they are unacceptable to a union. If challenged, the employer can prove the reasonableness of its proposals and, therefore, defeat a charge of bad faith bargaining by (1) showing that the same or similar proposals have been accepted by other unions, or (2) other evidence of reasonableness. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 405-407 (1952).

In the instant case, the Board and the ALJ, apparently adhering to the Board's prior decision in *Gulf States Manufacturers, Inc., supra*, refused to consider the Company's evidence that its proposals were reasonable. At the hearing, the Company presented John Bacon as an expert witness. Bacon's background included work as a union officer and as an editor of the Bureau of National

Affairs' collective bargaining publication. He also had extensive experience in hundreds of collective bargaining negotiations on behalf of various industries. Bacon testified without any personal remuneration (other than expenses) or previous relationship with the Company. The major thrust of his testimony and numerous exhibits introduced into evidence was that the Company's bargaining positions in regard to union access, management rights, union security and contract duration could not be considered "unusual" and were the same or similar to positions taken by many other employers and accepted by many other unions.[2]

Although the ALJ allowed Bacon to testify and allowed the documents identified by him to be admitted into evidence, his reaction to the Company's attempt to show the reasonableness and statistical prevalence of its proposals as evidence of good faith bargaining can only be described as disdainful. (Tr. 899-902)

Also, the ALJ refused to admit evidence into the record which showed the reasonableness of the Company's decision not to offer a general wage increase. This evidence consisted of exhibits offered by the Company containing independently conducted wage surveys for the geographical area in which the Company's plant is located with wage rates for similar jobs and skills. As Company Vice-President Kinander testified, it was only after studying these surveys that he concluded that the Company's wage rates were comparable to or better than those paid to similar employees in the area and that a general wage increase was not warranted. (R.Ex. 44-46) (Tr. 1045-1058)

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[2] These exhibits included portions of collective bargaining agreements removed from Bacon's personal files and excerpts from a publication of the Bureau of National Affairs concerning basic patterns in union contracts. (R.Ex. 20-29)

The ALJ's decision and the Order of the Board totally ignored the testimony of Bacon, the exhibits introduced into evidence and the rejected independent wage surveys. This failure of the ALJ and Board is in direct conflict with the test set forth by this Court in *American National Insurance Co., supra,* and applied by the Fifth Circuit Court of Appeals in *Gulf States Manufacturers, Inc., supra.*

In *American National Insurance Co.,* this Court, in approving a management rights clause offered by the employer, stated at 343 U.S. 405:

> ". . . A review of typical contract clauses collected for convenience in drafting labor agreements shows that management functions clauses similar in essential detail to the clause proposed by respondent have been included in contracts negotiated by national unions with many employers . . ."

The court in *Gulf States* noted that the employer in *American National Insurance Co., supra,* like the employers in *Gulf States* and the instant case, proved its proposals were reasonable by citing treatises and other publications on collective bargaining. At 579 F.2d 1320-1321 the court, in rejecting the position of the Board, stated:

> ". . . This holding appears to be inconsistent with, if not contrary to, the holding of the Supreme Court in *NLRB v. American National Insurance Co., supra,* where the Court approved this method of showing good faith by an employer . . ."
>
> * * *
>
> "Thus, the theory of the Board that no union would accept the Company's proposals in the instant case, is factually incorrect. *Its holding that even if other unions had accepted them, such acceptance would not be evidence of good faith appears to be legally incorrect.*" (Emphasis added)

III.

INTENSIVE NEGOTIATIONS OVER IMPORTANT SUBSTANTIVE PROVISIONS DID OCCUR.

Although the Board minimizes the importance of the lengthy negotiations which occurred by stating that such discussions involved only insignificant proposals, the record is replete with evidence and even admissions by Union representatives that meaningful bargaining on important contract provisions did occur. The following is a brief summary of this evidence:

—All information requested by the Union in aid of bargaining was promptly furnished by the Company. (G.C.Ex. 35, 40, 41)

—Twelve negotiating meetings were held prior to the strike in August, 1976. The six-month hiatus which occurred between the meeting of January 28, 1976 and the meeting of July 14, 1976 resulted because the Union requested no meetings.

—The detailed minutes and the testimony of the Union's chief negotiator demonstrate vividly that the approach of the parties to all issues was in-depth and far from perfunctory. (G.C.Ex. 32(a)-(1); Tr. 633-784) By November 13, 1975 agreement had been reached on approximately 80% of all non-economic issues. (R.Ex. 18(g), 19). Similarly, at the final negotiating session of August 4, 1976, the Union's negotiator conceded that there had been "a lot of give and take on both sides." (G.C.Ex. 32(1) p. 3)

—The record shows that the proposals upon which the parties agreed were extensive, and included such fundamental and substantial provisions as seniority, layoff and recall and grievance and arbitration, "no strike" by the Union and "no lockout" by the Company, wage rate progression schedule and many other non-economic and economic agreements. These agreements by the Company to initial Union proposals are in striking contrast to the position of the company in *NLRB v. Wright*

Motors, Inc. 63 F.2d 604 (7th Cir. 1979) upon which the Court of Appeals relies in its Order.

—The minutes of private caucuses of the Company during the negotiation meetings, subpoenaed by the Board, establish beyond doubt that the Company labored over contract provisions and earnestly sought a satisfactory agreement. (R.Ex. 18(c)-(i)) They are an important clue to the Company's subjective motivation.[3]

—Finally, after the meeting of January 28, 1976, when the Company presented its final proposals, it had a comprehensive offer on the table for a contract which was open to binding Union acceptance at any time thereafter. Thus, the Company was not evading agreement but merely seeking agreement on the best terms it could obtain.

IV.

IN ENFORCING THE ORDER OF THE BOARD, THE COURT OF APPEALS FAILED TO CONSIDER THE RECORD AS A WHOLE AS REQUIRED BY THE SUBSTANTIAL EVIDENCE RULE.

In its Order the Court of Appeals acknowledges that the Board may not sit in judgment of the substantive content of contract proposals. The Court then proceeds to weigh the proposals itself and distinguishes the decisions of the Fifth and Ninth Circuits in *Gulf States* and *Tomco* from the instant case by stating (in complete disregard of the instant record) that the Company herein introduced no evidence that its proposals were reasonable and made no concessions during the contract

[3] Counsel for the General Counsel introduced minutes of all of the negotiations into evidence. (G.C. Ex. 32(a)-(l)) However, these exhibits did not include minutes of the Company caucuses. Therefore, the Company introduced minutes of those negotiation meetings where caucuses were held and which include minutes of these caucuses. (R.Ex. 18(c)-(j))

negotiations. Instead, the court asserts that the instant case is more analogous to *NLRB v. Wright Motors, Inc., supra.*

The instant case is not at all analogous to the *Wright Motors* case for several reasons: in that case the employer proposed extremely harsh contract provisions unusual to the point of being bizarre such as guaranteed open-shop with limited check-off, a management rights clause not subject to grievance and arbitration, a no strike-no lockout clause providing for fines, injunctions and forfeiture of cash bond, permissive arbitration of grievances and complete company discretion in regard to wages and promotions. *Wright Motors, Inc., supra,* 603 F.2d at 608, n.5.

Also in *Wright Motors*, the employer could not and did not show that its proposals were reasonable. Finally, the employer in *Wright Motors* made *no* concessions during contract negotiations. In the instant case, the Board admitted in its brief to the Court of Appeals that the Company and the Union negotiated and reached agreement on numerous proposals. (Board Brief, p. 59)

The Company's evidence concerning the reasonableness of its proposals and the concessions made during collective bargaining were cited repeatedly to the Court of Appeals in the Company's Brief, Reply Brief and Petition for Rehearing. Yet in its Order, (A-82) the court stated:

> "In this case the Company failed to introduce evidence at the hearing that showed its extreme proposals were not unreasonable or irregular. Furthermore, the transcripts of the negotiating sessions reveal that the Company made no significant concessions on issues that go to the heart of collective bargaining contracts."

The failure of the Court of Appeals to consider the Company's evidence as to the reasonableness of its proposals constitutes a clear violation of the substantial evidence rule enunciated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). In defining the duty of the courts, this Court in *Universal Camera*, at 340 U.S. 474, 488 stated:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the *requirement* in both statutes that courts *consider the whole record*." (Emphasis added)

Since the Court of Appeals erroneously states that evidence of record was not introduced, it did not consider "the whole record" and did, in fact, "deem itself merely the judicial echo of the Board's conclusion." Thus, this case is that "rare instance when the standard appears to have been misapprehended or grossly misapplied" which requires intervention by this Court. *Universal Camera Corp., supra*, 340 U.S. at 491.

CONCLUSION

The Order of the U.S. Court of Appeals for the Seventh Circuit in the instant case places it in direct conflict with the Court of Appeals of the Fifth Circuit (*Gulf States Manufacturers, Inc., supra*) and the Ninth Circuit (*Tomco Communications, Inc. supra*) and the decisions of this Court in *American National Insurance Co., supra, H. K. Porter Co., Inc., supra* and *Carbon Fuel Co., supra*. In addition, the Board continues in its decisions to consistently ignore the mandate of the Courts of Appeal prohibiting it from compelling concessions by employers and otherwise sitting in judgment upon the substantive terms of collective bargaining agreements between employers and unions. The Board's defiant attitude also is in direct conflict with Section 8(d) of the Act which states that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession". 29 USCA § 158(d)

The failure of the Seventh Circuit Court of Appeals to limit the Board's improper intrusion into the collective bargaining process obviously places both employers and unions in an impossible situation regarding their bargaining posture because in some Circuits an employer may engage in "hard bargaining", whereas in other Circuits, the employer may be compelled to engage in "soft bargaining" subject to the whims of an administrative law judge and the Board who determine whether Company proposals are unacceptable or even distasteful to a particular union's negotiators or membership.

In order to resolve the conflict regarding the obligation of "good faith bargaining" on the part of an employer as mandated by Section 8(d) of the Act, we request that this Court issue the Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit as prayed for by the Company.

Dated this 25th day of April, 1980.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ELECTRI-FLEX COMPANY	Cases Nos.
and	13-CA-15687
DISTRICT NO. 122, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO	13-CA-16353 13-CA-16654

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DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was tried in Chicago, Illinois, on various dates between May 23, 1977 and August 17, 1977. On August 2, 1976, District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union or IAM, filed the original charge in Case No. 13-CA-15687 against Electri-Flex Company, herein called the Respondent or the Company, alleging a violation of Section 8(a)(1) and (3) of the Act. On August 11, 1976, the Union filed the first amended charge in Case No. 13-CA-15687 alleging violations of Sections 8(a)(1), (3), and (5) of the Act. On August 20, 1976, the Union filed a second amended charge in Case No. 13-CA-15687 alleging violations of Sections 8(a)(1), (3), (4) and (5) of the Act. On August 20, 1976, the Union filed a second amended charge in Case No. 13-CA-15687 alleging violations of Sections 8(a)(1), (3), (4) and (5) of the Act. Thereafter, on September 1, 1976, and November 3, 1976, respectively, the Union filed a third

amended charge and a fourth amended charge in Case No. 13-CA-15687, alleging violations of Sections 8(a)(5), (4), (3) and (1) of the Act. On February 14, 1977, a Complaint and Notice of Hearing in Case No. 13-CA-15687 issued alleging violations of Sections 8(a)(1), (3) and (4) of the Act. On February 24, 1977, the Respondent filed an Answer in Case No. 13-CA-15687 denying the violations alleged in said Complaint.

On February 28, 1977, an amendment to the Complaint issued in Case No. 13-CA-15687, alleging an additional violation of Sections 8(a)(3) and (4) of the Act. On March 4, 1977, the Company filed its Answer to the Amendment denying the violations alleged.

On March 29, 1977, the Union filed the original charge in Case No. 13-CA-16353, against the Respondent, alleging violations of Section 8(a)(1) and (3) of the Act. On May 3, 1977, a Complaint and Notice of Hearing issued in Case No. 13-CA-16353, alleging violations of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. On that same date, a second Amendment to the Complaint in Case No. 13-CA-15687 issued alleging additional violations of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. Additionally, on that same date, an Order Consolidating the Cases issued.

Respondent filed its Answer in Case No. 13-CA-16353 on May 9, 1977, denying the violations alleged in the Complaint. In addition, on the same date, Respondent filed its Answer to the second Amendment to the Complaint in Case No. 13-CA-15687 wherein it denied the violations alleged.

When the hearing commenced on May 23, 1977, the Complaint, in Case No. 13-CA-15687 was amended to add to paragraph IV of said Complaint, the name Jesse Garcia as assistant foreman. The Complaint at paragraph XI was also amended to add a subsection (2) of that paragraph, an allegation that on or about May 16, 1977, Respondent unilaterally changed existing terms and conditions of employment of its employees without notice to, or bargaining with the Union, by establishing

a new disciplinary policy for failure to wear safety glasses in the Plant. Respondent denied Garcia's supervisory status. As the hearing progressed, the Complaint in Case No. 13-CA-15687 was further amended to add to paragraph IV, the name Lawrence J. Zimmerman as a personnel consultant, and agent of the Respondent. Respondent denied Zimmerman's agency status.

On July 14, 1977, the Union filed the Charge in Case No. 13-CA-16654 against Respondent, alleging violation of Sections 8(a)(3), (4) and (1) of the Act. On July 22, 1977, a Complaint and Notice of Motion to Consolidate Cases, in Case No. 13-CA-16654 issued, alleging violations of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. In addition, Counsel for the General Counsel moved to consolidate all three cases. When the hearing was resumed on August 1, 1977, I granted the Motion To Consolidate cases thereby consolidating Case No. 13-CA-16654 with Cases Nos. 13-CA-15687 and 13-CA-16353. On August 5, 1977, Counsel for Respondent filed its Answer in Case No. 13-CA-16654 denying the violations alleged in the Complaint and setting forth as an affirmative defense that the Regional Director of Region 13 abused his discretion by assigning Rochelle Golub who appears as Co-Counsel for the General Counsel herein, as the investigator of the charge during a recess in the course of the hearing. At the hearing, Counsel for the General Counsel made a Motion to strike Respondent's affirmative defense in Case No. 13-CA-16654, which was denied. In their brief, Counsel for the General Counsel renewed their Motion to strike Respondent's affirmative defense. That Motion is denied. On August 15, 1977, Respondent informed me, and Counsel for the General Counsel by telegram, that it did not intend to present a defense in that case, but, would instead rely on its Answer. Moreover, Counsel for the Respondent suggested that the hearing be dispensed with and the record be closed forthwith.

On the last day of hearing, August 17, 1977, the second amendment to the Complaint in Case No. 13-CA-15687, was amended to add at paragraph VII, three

additional allegations of violations of Section 8(a)(1) of the Act. Respondent denied the additional alleged violations.

Based upon the entire record in this case, including extensive briefs filed by the parties and my observation and evaluation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Electri-Flex Company is an Illinois corporation engaged in manufacturing flexible electrical conduit, with its principal office and place of business in Roselle, Illinois, where, during the past year, it purchased and received goods and materials directly from points outside the State of Illinois, which were valued in excess of $50,000.

Respondent admits, and I find, that it is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

Respondent admits, and I find, that the Union herein, is a labor organization within the meaning of Sections 2(5) of the Act.

On August 15, 1975, the Union was certified as the collective bargaining representative of Respondent's employees in the unit described below, and by virtue of Section 9(a) of the Act, is and has been since August 15, 1975, the exclusive collective bargaining representative of all employees in said unit, for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

The bargaining unit is: All full-time and regular part-time production and maintenance employees employed at the employers facility currently located at 222 West Central Avenue, Roselle, Illinois, excluding office clerical employees, professional employees, administrative

employees, managerial employees, guards and supervisors as defined in the Act.

II. The Unfair Labor Practices

A. *Background*

The instant cases are but part of the continuing saga between Respondent and the IAM. On March 17, 1977, the Board issued a decision and order affirming the findings and conclusions of Administrative Law Judge John M. Dyer, which appears in 228 NLRB No. 79. On February 14, 1978, the Court of Appeals for the Seventh Circuit granted the Board's Petition For Enforcement.

I take administrative notice of the Board's and Court's decision wherein Respondent was found to have *inter alia*, engaged in pervasive 8(a)(1) conduct and unilaterally instituting and enforcing a written, warning notice—disciplinary system, without bargaining with the Union. Furthermore, Respondent was found to have engaged in 8(a)(1), (3) and (5) of the Act by discriminatorily transferring, laying off and discharging union adherents.

Many of the same employees and supervisors herein, were also involved in the prior case. The following should serve to illustrate the cast of characters and the issues present before me:

Alleged Independent 8(a)(1) Conduct

Employee	Supervisor	Conduct
Ignacio Marrero	Mario Colosi	Threats
Teofilo Lopez	Jesse Garcia[1]	Threats
Atanacio Martinez	Luis Caban	Promise of benefits
Luciano Colon	Luis Caban	Promise of benefits
Luciano Colon	Luis Caban	Threats
Pickets	Bob Bily	Surveillance
Sergio Perez	Luis Caban	Threats
Leoncio Gonzales	Celestino Hermandez	Threats

[1] Supervisory status denied—all others admitted to be supervisors within the meaning of the Act.

Alleged 8(a)(3) and (4) Conduct

Employee	Incident[2]
Andrian Velez	Failure to report back to work after job-related accident—discharged
Atanacio Martinez	Withholding raise, and April, 1977, suspension
William Negron	Failure to call in or report to work when strike terminated—discharged
Mario Negron	Failure to call in or report to work when strike terminated—discharged
Teofilo Lopez	Assaulting foreman—discharged
Nelson Acevedo	Failure to clean machine—discharged
Martin Ibarra	Took a trip to Florida without calling in absent—discharged
Leoncio Gonzales	Absent without calling in—5-day suspension

The remaining issues to be resolved are whether the Respondent engaged in bad faith, "surface bargaining" by *inter alia*, adherence to "patently unacceptable" proposals such as wages, management rights, duration of contract, union security and union access to the plant. It has also been alleged that the Respondent violated Section 8(a)(5) of the Act by unilaterally establishing a new disciplinary policy for failure to wear safety glasses in the Plant. Respondent is also alleged to have entered in a new employee's personnel file, a memorandum reflecting this employee's union sentiments.

B. *The 8(a)(1) Violations*

Ignacio Marrero, shop chairman,[3] was approached by Mario Colosi, plant superintendent, on May 21, 1976. Colosi told Marrero that employee Martin Ibarra had accidently cut his hand for the second time, and asked him what he wanted him (Colosi) to do about it.

[2] The "incidents" are merely to serve as introductory guidelines or a frame of reference so as to render the discussion and analysis more intelligible.

[3] Marrero was found to have been laid-off in violation of Section 8(a)(1) and (3) in 228, NLRB No. 79.

According to Marrero's version, Colosi stated, "What do you want me to do, give him time off, a warning ticket, give him a raise or fire the guy?" Marrero asked what he was going to do, and Colosi responded, "I think I better fire this guy." Marrero replied, "Mario if you are going to fire the guy, I am going to file charges with the Labor Board," Colosi countered, "I will tell you what. You know what I'm going to do. If he still gives me problems to take charges to the Labor Board, you know, what I am going to do, we are going to move the plant out of here." Marrero replied, "Well Mario, I don't give a damn if you are going to move the plant or not because this is not the only place to work in the State of Illinois." Colosi then winked at Enrique Garcia,[4] Slitting Department foreman, who was present during the conversation.

Colosi confirmed the incident as related by Marrero, although he specifically denied that aspect of the conversation dealing with moving the Plant. Counsel for the Respondent do not argue that Colosi should be credited, rather they aver that Colosi, "obviously was joking . . . ."

In support of this proposition they cite, *Baker Machinery Co.*, 184 NLRB No. 39 and *Ingersoll-Rand Co.*, 219 NLRB No. 77. In *Baker Machinery* the statement, whether made seriously or in jest was not necessarily related to union activity. In *Ingersoll-Rand Co.*, the Board reasoned that the Administrative Law Judge credited a supervisor and found that the remark was made in "obvious jest." Those cases are inapposite to the instant case. Furthermore, I credit Marrero's version and specifically discredit Colosi. Therefore, I conclude that Colosi's conduct in this regard violates Section 8(a)(1) of the Act.

Supervisory Status and Conduct of Jesse Garcia

Respondent contends that Garcia is a rank-and-file employee, relying *inter alia*, on the fact that he voted in

[4] Garcia was not called to testify.

the election without challenge and participated in the election as a company observer. Thus, Respondent considers him a leadman who performs "setup" duties, although conceding that he has filled in for Luis Caban, an admitted supervisor, during Caban's absence from the Plant, on isolated occasions.

Counsel for the General Counsel allege that Garcia is an assistant foreman, and as such, is a supervisor within the meaning of the Act.

Garcia testified that he does not have the authority to hire, fire,[5] promote or demote employees but, among his duties he saw to it that the men he was "in charge of" correctly recorded their hours, wore safety equipment, do not loaf, produce, keep the machines in repair and the area clean.

Record testimony reveals multitudinous examples of payroll change notices, absence and tardy reports, separation notices and warning notices[6] taken from employee personnel files and signed by Garcia for the period August, 1975, through April, 1977. Garcia also testified that he issued these various writings of his own accord. Moreover, he has, on his own initiative, arranged employee safety meetings where he presided and he has appointed set-up men to speak at these meetings. Garcia and Caban both acted as Company interpreters in disciplinary meetings. He has effectively recommended raises and, in Caban's absence, actually granted raises.

Respondent contends that except when he temporarily acts as a foreman during Caban's absence, employees did not view Garcia as a supervisor. Counsel for Respondent cites two instances where employees' attitudes belie Garcia's supervisory authority. It is my opinion that these two examples reflect something less

[5] Later in his testimony, he admitted specifically firing employees on two occasions, although it appears that Caban was not present at the Plant and he may have been acting in Caban's absence.

[6] Referred to throughout the hearing as warning "tickets."

than respect for Garcia, rather than a lack of recognition of Garcia's supervisory authority.

Based on the evidence I find and conclude that Garcia has sufficient authority and has exercised same, to render him a supervisor within the meaning of the Act.

Sometime during June or July, 1976, Garcia, according to the testimony of Lopez, asked Lopez how the Union was doing and "about the contract." Lopez responded that it was going fine. Garcia replied that the Company had good lawyers and a lot of money and would move rather than let the contract and the Union in.

According to Garcia, Lopez asked him what he thought about the Union and he, Garcia, responded that he did not know. Lopez asked him what he thought the Company would do,—if the Company would give in. Garcia replied, "I know what I would do if I was the company, I would move before I would give in to them." He stated further, "I think that the company's got a lot more money than the union, and that the company would beat it, beat them."

Respondent contends that Garcia's version of the conversation should be credited and if so it falls within the "free speech" proviso of Section 8(c)[7] of the Act. Counsel for the Respondent argue in effect, that Garcia was not in any position to participate in any decision the Respondent might make regarding relocation. Furthermore, by recently adding a large addition to its present facility, Respondent conspicuously revealed its intent not to move. I credit Lopez and conclude that his, is the credible version of the conversation.

Furthermore, I disagree with Respondent's contentions and find that responsibility for Garcia's statements should be imputed to the Respondent. Accordingly, I find that said statements constitute a violation of Section 8(a)(1) of the Act. Cf. *Valley Oil Co., Inc.*, 210 NLRB 370.

[7] Respondent, in its brief, mistakenly cites the Section as 9(c).

Luis Caban's Alleged Promise of Benefits To Antanacio Martinez

Antanacio Martinez, who is presently working for the Respondent, began his employment on August 18, 1975, at a wage rate of $3.25 per hour. During the period of August 1976, he was earning $3.50 per hour.

According to the testimony of Martinez, on August 3, 1976, he was working overtime in the Plant's interlock department. Luis Caban, in passing Martinez' work station was spoken to by Martinez. Martinez asked Caban if he could be given a raise in view of the fact that he was aware of many others at the Plant who were getting raises. Caban responded, "that is alright," he was going to speak to Mario Colosi.

The next day, on August 4, Martinez was driving the lift-truck in the square lock department. As Caban walked past Martinez, he commented, "hey brother, brother-in-law, Mario Colosi agreed to give you the raise that you have asked me for because he say (sic) that you are not with these union people." According to Martinez, Caban then stated "and if you do not attend tomorrow's meeting we are going to give you another quarter."

The meeting refers to a union meeting which was scheduled for the following day the purpose of which was to take a strike vote. Notices of the meeting were posted for all to see in the Plant cafeteria and near the door to Mario Colosi's office.

It is Respondent's position that when Martinez was denied the raise he became incensed enough to fabricate his testimony. Although Respondent admits that a raise was promised to Martinez, it takes the position that the promise was not a *quid pro quo* for failing to participate in the union meeting.

Caban confirmed Martinez' testimony that on August 13, Martinez came to him with his paycheck to ask about his raise and that Caban sent him to see Wolbing who was the acting foreman at that time.

Caban repeatedly stated that he did not recall whether or not he spoke with Martinez about having granted him the raise on August 4. He eventually testified that Martinez asked him for the raise but he denied that portion of Martinez' testimony dealing with his pro, or union sentiments and predicating the raise on Martinez' failure to attend the union meeting.

Having witnessed the demeanor of Caban on the witness stand and his equivocal responses, I discredit his testimony and conclude that the testimony of Martinez should be credited as an accurate version of the events. Accordingly, I find that Respondent violated Sections 8(a)(1) and (3) of the Act.

Caban's Alleged Promise of Benefits to Luciano Colon

According to Colon's testimony, on August 4, 1976, while at his workplace, Colon was approached by Caban who broached a discussion about the union meeting to be held the next day. During the conversation, Colon asked for a raise and was told by Caban that he could get a raise if he did not go to the union meeting and that the Respondent would make him a mechanic and send him to school.[8] Colon, who had been in the Respondent's employ for a relatively short period of time asked if new employees attended the meeting what would happen to them. Caban allegedly responded that he would not give any more work to them.

In his direct examination by Respondent's counsel, Caban initially testified that he did not remember any conversation with Colon on that day. He continued testifying that he did not remember a conversation with Colon on that day concerning a raise. When asked a leading question detailing Colon's testimony, Caban specifically denied the alleged conversation.

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[8] Record testimony revealed that Respondent conducted a "school" to teach English to foremen and other employees.

I find Luciano Colon's testimony to be credible and for the reasons set forth above, I discredit Caban's denial. Accordingly, I conclude that Caban's promises to Colon predicated on Colon refusing to engage in union activity violates Section 8(a)(1) of the Act.

Furthermore, I find and conclude that Caban's statement to Colon, that if new employees attended the meeting, Colon would not give anymore work to them, is tantamount to a threat of discharge for attending a union meeting and as such, is an additional violation of Section 8(a)(1) of the Act.

Alleged Surveillance of Picketing

On the morning of the first day of the strike, August 16, 1976, according to Colosi, 25 to 30 strikers congregated in the area of the driveway and the street outside of the Plant. Colosi testified that he observed two pickets marching across the driveway and about eight or nine other employees standing in the driveway preventing trucks from entering or leaving the Plant. According to Bily's estimate, there were 10 to 15 people in the area.

Colosi instructed Bily to take a picture of the activity from the inside of the building with a polaroid camera. The glass through which Bily focused the camera was tinted, thus the photograph came out black. Bily then left the building and went to the area where the strikers and pickets were congregating. Colosi and Bily both testified that when Bily went outside with the camera, the employees in the driveway dispersed. Bily admitted that it was after the employees in the driveway dispersed that he raised the camera and focused it. Bily testified further that he did not even attempt to snap the shutter.

In Respondent's affirmative defense it asserts that Bily was acting in conformity with the manual which had been furnished to supervisors by Counsel for the Respondent, which provided among other things, that photographs should be taken of violent pickets, mass picketing or unlawful acts, so as to provide a basis to

seek an injunction to prevent the picketing. The manual admonished that peaceful activity should not be photographed.

The Board held in a myriad of cases, that whether pictures are taken or not has no bearing on the coercive effect such conduct has on employees. Indeed, the fact that Bily did not take a photograph or even trip the shutter convinces me that his conduct was calculated to coerce and restrain striking employees by creating fear in them, that their activities might be used in the future in a retaliatory manner. Respondent has not adduced evidence in this record that Bily's act of taking one photograph and focusing a camera were for legitimate purposes such as to provide evidence to get a state court injunction to enjoin violence or mass picketing. It appears to me that the picketing was peaceful and there is no evidence other than a statement from Bily that the egress of trucks was blocked. See, *Russell Sportswear Corp.*, 197 NLRB 1116 and cases cited therein.

I find and conclude that Respondent's conduct described above, violated employees' rights as guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

Caban's Alleged Threats to Perez

Sergio Perez, who has worked for the Respondent for approximately 11 years, testified against the Respondent on behalf of the General Counsel in the prior proceeding, and was credited. Perez participated in the strike in August, 1976.

During the period, sometime after the strike, Respondent transferred Perez from job-to-job and machine-to-machine. Apparently, many employees were similarly being transferred around the Plant on a continuing basis.

Perez testified that in September, or October, 1976, while he was welding at about 11 a.m., Caban, who was coming from the cafeteria walked past him. Perez stopped Caban and asked why so many people were

being transferred from job-to-job. According to Perez, Caban responded that the people who were being transferred were all those who had gone to the Labor Board and that according to the Respondent, those people were a bunch of trouble makers. Perez countered that was not his problem because he was doing his job. Caban then told Perez that after 1 year passed, everything would be back to normal as it was in the beginning, and there would be no more problems. Furthermore, Caban told Perez that if any of those people who went to the Labor Board quit of their own accord, or were fired, they would never be able to get a job in the State of Illinois.

Respondent contends that it would be incredible that a supervisor, i.e., Caban, who was charged with substantial 8(a)(1) conduct in the previous proceeding, would make such comments to one of the accusers in that proceeding.

Based on the demeanor of Perez and his straightforward manner of testifying, I credit his testimony in all respects regarding his conversation with Caban. Furthermore, I conclude that Perez was unreliable in his denials, many of which were elicited on direct examination by leading questions. I therefore, specifically, discredit Caban's testimony which related to the threats made to Perez. Accordingly, I find that Caban's conduct violated employees' rights as guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

Hernandez' Threats to Gonzales

Leoncio Gonzales began working for the Respondent on July 7, 1975. He and other employees participated in the strike at the Respondent's Plant in August, 1976. He performed picket line duty from 4 a.m. to 8 a.m., and recalled seeing Colosi, Caban, Bily, Detrick and Hernandez, all supervisors, passing through the picket line.

On March 14, 1977, Gonzales was assigned by Caban to Hernandez' department, where Hernandez ordered

Gonzales to repack roles of cable from wire baskets to cardboard boxes instructing him to utilize the lift-truck to move the wire baskets. According to the testimony of Gonzales he had never driven a lift-truck prior to that day. While attempting to place the forks under the wire baskets, some of the baskets fell over spilling out cable. Gonzales reported the accident to Hernandez, who got Colosi and brought him over to the area of the spilled baskets. At this time Colosi said nothing to Gonzales, and Gonzales had everything cleaned up in something less than in an hour.

At approximately 4:25 p.m. on the same day, Hernandez came up to Gonzales and presented him with a warning ticket. Hernandez stated, "I am giving you this ticket, I hope you don't get mad about it because this ticket, it is not I who give it to you, it is Mario Colosi who is sending it. Don't feel resentful about it because before the union started here they didn't give these tickets here. From the union on, is when this thing happened. For that reason, this ticket is issued." Hernandez told Gonzales not to feel bad about him i.e., Hernandez, because he handed him the ticket, and that the Union had spoiled the whole thing and that "the people who were being fired all had too—all was because of the union." Hernandez then told Gonzales that Colosi had wanted to send him home after the incident, but, he convinced Colosi to let Gonzales finish his 8 hours. At the end of Gonzales' 8-hour shift, he was suspended for 3 days.

Hernandez was called upon to testify on behalf of the Respondent and he denied Gonzales' testimony regarding the March 14 conversation. I find the testimony of Gonzales to be reliable and I discredit Hernandez[9] regarding the conversation which occurred between Gonzales and Hernandez on March 14, 1977. Accordingly, based on Gonzales' credible testimony, I find that Hernandez, by these statements, set forth above, violated Section 8(a)(1) of the Act.

[9] The Administrative Law Judge in the prior case arrived at the same conclusion in assessing Hernandez' credibility.

The Discharge of Adrian Velez

Adrian Velez began working for the Respondent in February, 1975. The Union commenced to organize Respondent's employees sometime in June, 1975. Velez signed a union authorization card and attended most of the union meetings which were held both before and after the election.[10] On the morning of the election, Velez distributed union literature in front of the Plant and acted as the union observer at the election.

On April 15, 1976, Velez testified on his own behalf, in support of numerous 8(a)(1) allegations and an allegation that he was transferred to another job, in violation of Section 8(a)(3) of the Act. An Administrative Law Judge found, as affirmed by the Board and Court, that Velez' transfer was "for the purpose of punishing and discouraging Velez for his union sentiments and in attempt to get rid of him prior to the union election." Velez' testimony in support of alleged 8(a)(1) conversations he had with supervisors was credited and the Respondent was found to have violated Section 8(a)(1) of the Act in this regard.

On April 22, a week after Velez had testified, his foreman in the extruding department, Bily, told him to get a haircut because his hair was too long. Bily advised Velez that the order to get a haircut came from Colosi. Velez told Bily that other employees had long hair, and they were not told to get a haircut, but, Velez agreed to get the haircut. Bily responded that he did not care about any other employees. The next day, Velez got a haircut.

On the next working day, which was Monday, April 26, Bily asked Velez if he had gotten a haircut and Velez responded affirmatively. According to Velez, Bily looked at his head of hair and stated that he was not pleased with the haircut Velez had gotten. Approximately ½ hour later, Velez was called to Colosi's office. Present in Colosi's office, were Colosi, Bily, and union stewards Rose and Negron. Colosi told Velez he did not

[10] The election was held on August 7, 1975.

like his haircut and told him to get it cut more, because of Company rules. Velez requested to see the rules and Colosi refused. Colosi then instructed Bily to give Velez a warning ticket. Bily wrote the following warning ticket and presented it to Velez. "If Adrian Velez does not come in to work on Tuesday morning, April 27, 1976, with a reasonable haircut, he will be sent home until the time that he does get a haircut in accordance with the ruling set by management that all employees must get a haircut as per a meeting on April 26, 1976, with Dick Rose, Bob Bily and Mario Colosi." The warning notice was signed by Robert E. Bily.

A couple of hours later that day, Bily took Velez back to Colosi's office, where again, Negron, Rose, Bily and Colosi were present. Colosi advised Velez that in keeping with Company rules Velez had to wear a hair net. Furthermore, Colosi stated that if Velez refused to wear the hair net he would have to go home. Velez took the hair net and left the office. Sometime during the afternoon, Colosi posted a notice in English[11] regarding haircuts and hair nets. The notice which is dated March 22, 1973, reads as follows:

NOTICE TO EMPLOYEES

> Effective Monday, March 26, 1973, any employee who has long hair will be required to wear a hair net for his own safety.
>
> Long hairs will have a choice of either cutting their hair to a safe reasonable length or wearing a hair net.
>
> It will be up to the discretion of the management on deciding who's hair is dangerously long.

The notice is signed Management. Ignacio Marrero, an employee who has been with the Respondent since 1974,

[11] During the course of the trial the Spanish-speaking employees with some few exceptions, testified through an interpreter. Although most of the employees spoke some English, they felt that they would be more comfortable and articulate testifying in their native tongue.

testified that he saw the notice posted sometime during the recess of the preceding trial between April 26, and May 10. He testified further, that he had never seen the notice posted prior to that time. Additionally, Marrero testified that employees did not wear hair nets prior to the time the notice was posted.

Velez testified that he was so embarrassed and ashamed about having to wear the hair net, that he wore a wool-knit ski cap over the net. For the next week, on a daily basis, Bily checked Velez to make sure he had the hair net on under the cap, insisting on each occasion, that Velez remove the cap and thereby show Bily that he was wearing the hair net. On several of these occasions, Bily threatened to send Velez home if he did not have the hair net on under the cap. Bily warned Velez that he did not want to see one single strand of hair out of the net.

On June 23, Velez was working in the Extruding department on a piece of equipment known as the NRM machine. Velez informed Bily that the conveyor on this machine was not in a fixed stationary position, but, rather, was moving around because it was not properly severed to the floor. Bily told Velez to continue working, that he would have the conveyor repaired later.

The next day, according to the testimony of Velez, shortly before noon, cable got stuck in the head of the NRM machine. In trying to free the cable, Velez lost his balance and fell backward. The conveyor which apparently had not been bolted to the floor, fell toward Velez who was lying on the floor. Velez caught the conveyor with his hands supporting it at about chest level. Several employees lifted the conveyor off of Velez and helped him to a standing position. Then several foremen, including Colosi, arrived. Colosi instructed Velez to demonstrate how the accident occurred, because according to Colosi, insurance would not cover Velez and he would not cover Velez and he would not send Velez to the hospital. Velez demonstrated how the accident occurred and Colosi then sent him to the Company doctor, Dr. Pevsner.

According to Respondent's witnesses, Velez fell to the floor with one section of the conveyor coming to rest across his shins. Furthermore, the full weight of the conveyor was not on Velez' legs, since the section which fell remained connected to the other sections of the conveyor which did not fall.

Two foremen, Hernandez and Slad, testified that Velez got up from the floor immediately and began flexing his arms and muscles while walking around the floor, thus indicating that he had not been injured as a result of what the Respondent characterizes as Velez' negligence.

After seeing Dr. Pevsner, Velez was released and returned to perform light-duty work. The doctor gave Velez a note to take back to the Company stating that he was to perform light-duty functions, accordingly he was assigned to make hangers. Sometime in the afternoon of the day of the accident, Bily called Velez in to Colosi's office. Colosi handed Velez a warning notice, cautioning Velez against further instances of on-the-job injury due to carelessness. The notice was signed by Mario Colosi as plant superintendent and Robert Bily, extruding foreman. Colosi told Velez he was issuing this warning because Velez had too many accidents.

At approximately 5 p.m. that same day, Velez testified that he observed the maintenance man, Tuleja, bolting down the NRM conveyors.

On June 23, Velez sent West Kinander, president of Respondent, a registered letter detailing the history of his past accidents.

Velez visited Dr. Pevsner on three other occasions and on June 29, Pevsner released Velez, although Velez insisted that he still had pain in his back. Velez returned to work on June 29, after his appointment with Dr. Pevsner and gave Bily the doctor's release slip. Bily assigned Velez to the grinding machine. Velez stated that he was in pain, but, Bily told him that the doctor had certified that he was able to perform normal duties. Velez tried unsuccessfully, to lift a cable to grind and he

notified Bily that because of his back pain, he could not perform functions on the grinding machine. Bily then assigned Velez to do cutting on the NRM. He worked there for the rest of the day assisted by a machine operator and packer.

On July 1, Velez told Bily that he was still suffering great pain in his back and he wanted to see the Company doctor. Bily refused and as a basis for this refusal, stated that Dr. Pevsner had already certified Velez recovered, and then he assigned Velez back to the grinding machine. Velez was again unable to lift the boxes containing the cable to be ground, so Bily reassigned Velez back to the NRM. Velez' back continued to hurt and he complained to Bily that he was in pain. Bily told Velez in the presence of Marrero and Negron that there was no more light work for him and Velez should go home until his back improved. Velez left at approximately 9:30 a.m.

Later that day, about 3 p.m., Velez learned that a message had been left for him at his mother-in-law's house, he was to call Marrero at the Plant. Velez called the Plant and first talked to Bily. Bily asked him how he felt, and Velez responded that he was still in pain and was attempting to make an appointment with his personal physician. Then Velez requested to speak to Marrero. Marrero told Velez that he had been instructed to call in and relate to him that Respondent had found light work for Velez to perform, and if he wanted to return to work, he would be paid for the entire day. Velez told Marrero that he was still in pain and trying to set up a doctor's appointment, that he would return to work when his personal physician released him as being fit. Marrero corroborated Velez' testimony, adding that when Marrero communicated to Bily, the contents of his conversation with Velez, Bily stated that it was alright and requested Marrero to tell Velez, if he saw him, to come to work the next day. Marrero told Bily he would attempt to do such.

Velez arranged an appointment with his doctor for Tuesday, July 6. On Monday night, July 5, Velez met

acting foreman, William Negron at a fourth of July parade in Elgin, Illinois. Velez advised Negron that he would not be at work the next day. On Wednesday, July 7, Velez called Negron between 8:30 and 9 a.m. to tell him he would again be absent from work.

Respondent, on Wednesday, July 7, sent a telegram to Velez' mother-in-law's house. The telegram stated, "Since you have failed to report to work Tuesday, July 6, and Wednesday, July 7, you are hereby notified if you do not report to work Thursday, July 8, 1976, at 7 a.m., CDT, you will be terminated." The telegram was signed by Electri-Flex Company, Roselle, Illinois. Velez sent a reply telegram stating:

> Mr. Bob Bily sent me home and I not to report to work until my back is cured. I can't report to work on July 8, because of an appointment with the doctor in Chicago.

On July 8, Velez called the Company and speaking to Negron, told him he would not be coming to work. On Friday, July 9, Velez received notice of a telegram which he picked up on Saturday. The telegram was signed by Bruce Kinander and stated that Velez was terminated effective immediately, since he "repeatedly failed and refused to report as instructed and failed to follow the Company established rules for reporting absences."

Kinander testified that he was not told that Velez called or contacted the Company between July 1, and July 9. Later in his testimony, Kinander claimed that he was told by someone, he did not know who, that Velez did not come to work on Tuesday or Wednesday, July 6 or 7. Upon further questioning, Kinander said that the acting foreman told him. He then stated that he learned of Velez' absences from the absence reports and consulted with the acting foreman to confirm the report. Kinander then corrected himself and testified that he talked to Slad, the assistant foreman, or Brilz, the acting superintendant, but, Kinander did not recall anything about the alleged conversation.

Brilz, in his testimony, denied speaking to Kinander the week Velez was discharged. Slad testified that he never spoke to any individual connected with management about Velez. Even Colosi testified he did not discuss Velez with Kinander between June 24, the date of Velez' accident, and the time he, Colosi, returned from vacation which was after the Velez discharge. Furthermore, Bily testified that he did not know Velez was going to be terminated before he left for vacation on July 1, and he did not recommend the discharge or discuss Velez with anyone including Kinander, prior to leaving for his vacation.

Kinander testified that he consulted his attorneys prior to sending Velez the July 7 telegram. Furthermore, according to Kinander's testimony, before he sent Velez the discharge telegram on July 9, he reviewed Velez' personnel file. When Velez did not respond to the July 7 telegram, or show up to work, Kinander called his attorneys again and discharged Velez. Kinander offered no explanation as to why he discharged Velez in the face of the fact that Velez' reply telegram was in Velez' file which Kinander acknowledged he had perused. Kinander further testified that his principle concern when an employee is absent, is that the employee give some notice to the Company to intelligently schedule the production.

Although Respondent's defense to the discharge of Velez was his failure to call in or in any other manner, report to management, his intentions to be absent from work, Respondent introduced various medical records and the testimony of two physicians, Dr. Leonard Smith, and Dr. Leo Pevsner. Both physicians testified, at some length regarding Velez' back injury. Dr. Pevsner, the clinic doctor, both in his testimony and his medical report, expressed the opinion that Velez was malingering throughout his examination. His diagnosis was that at worst, Velez may have had a mild Lumbosacral sprain. Furthermore, according to this doctor's report, the possibility of a contusion was present, but, there was no evidence of a contusion, and the treatment was for

what would be considered a mild sprain or perhaps a mild contusion. At the request of Aetna Life and Casualty Company, Velez was examined by Dr. Smith on August 6, 1976. This was some 6 weeks after the accident, thus, a definitive diagnosis was not possible. Dr. Smith found no evidence of any bone injury or any neurological involvement. He stated that it is possible that Velez may have incurred a sprain, strain or contusion of his back. He could not rule that out. Smith stated in the normal course of healing of such injuries, they would heal in anywhere from 2 to 4 weeks. Accordingly, whatever soft tissue injury Velez may have incurred should have been healed by the time of his examination if indeed, there was an injury, according to Dr. Smith. Dr. Smith examines a few hundred patients in a year for various insurance companies and compensation carriers.

As stated earlier, Velez was the subject of an 8(a)(1) and (3) charge in the earlier proceeding. The Seventh Circuit Court of Appeals affirmed the Board, in finding that the transfer of Velez to another job was for the purpose of discouraging Velez from engaging in union activity, and an attempt to get rid of him prior to the election. In my view, and on the basis of all the testimony, it is apparent that the Respondent has continued in its pattern of harassment and discriminatory tactics with an aim towards ridding itself of Velez and discouraging union activity among its employees.

To begin with, Velez was subjected to a most vigorous harassment regarding his hair and the hair net. Based on my observation at the hearing, I would not characterize his hair then, as being long and based on his testimony and description during the period in question, I would characterize his hair as being the average length in relation to how men wear their hair today. But, assuming *arguendo*, that Velez had long hair and that it was necessary to have employees wear hair nets as a safety measure I conclude that the Respondent used this as a device to demean and embarrass Velez. At the hearing, Velez demonstrated how he wore his hair net

and the ski cap over the hair net. In spite of this, Respondent continued to request Velez to remove the ski cap so that it would reveal whether or not he was wearing his hair net. This could serve no purpose other than to embarrass and harass Velez in view of the fact that the ski cap was more than adequate in keeping his hair away from any machinery and the hair net was rendered superfluous. I will not belabor this issue, sufficed to say, this is simply another indication of Respondent's motivation and resolve to rid itself of Velez, one way or another.

It should be noted that Respondent commenced to harass Velez about the length of his hair, 1 week after Velez testified against Respondent in the prior case.

The fact that Velez had an accident on June 24, is beyond dispute. Respondent attempted to show that the accident was a result of Velez' failure to pay attention to what he was doing, i.e., carelessness. Although the evidence indicates that the accident was not caused by carelessness on the part of Velez, in view of the fact Velez had advised the Respondent that the NRM machine was not properly bolted down, I fail to see how this is relevant to Respondent's defense. Respondent's defense as set forth in its discharge telegram, to Velez, is that Velez failed to adhere to Respondent's call-in rule.

The record is rife with circumstances which point to an unlawful motive in the discharge of Velez and a typical case of pretext. For example, Bily admitted sending Velez home indefinitely, on July 1, because he had no light work for Velez. Nevertheless, after Bily consulted with Respondent's attorneys several hours later on the same day, he miraculously found light work for Velez to perform. Bily's explanation was, "It was just made clear to me I should call him back to work."

Respondent devoted much time and effort in elliciting testimony designed to reveal that the extent of Velez' injury was minimal. In this regard, the two physicians who possessed impressive *curricula vitae*, testified extensively. It is clear that Dr. Pevsner, in his testimony and his medical report, expressed the opinion that Velez was malingering. In this regard, it should also be noted, that the physician did not rule out the possibility that an emotional block may have contributed to Velez' inability to respond to the examination. Be that as it may, I do not view the issue as being whether or not Respondent reasonably called Velez back to work. Nor, can I find and conclude on the state of the record that Velez was in fact, malingering. In my view, Respondent intended to establish a second defense to Velez' discharge, a defense raised at the 11th hour. Accordingly, I am in agreement with Counsel for the General Counsel, that the shift in defenses is itself, indicative of Respondent's discriminatory intent.

Kinander testified employees were required to give notice when they were absent from work, and the purpose of this was so that the Company could intelligently schedule the work. Negron, whose testimony I credit, corroborated Velez, that Velez told him in person, on July 5, that he would be absent on July 6. Furthermore, Negron testified that Velez called him on the mornings of July 7 and 8 and gave notice that he would be absent. Moreover, Negron testified that he told Brilz, acting superintendent, that Velez had reported his absences, yet Brilz forced him to sign absence reports, which Brilz wrote out for Negron. This evidence coupled with Velez' reply telegram, lead me to the inescapable conclusion that Velez responded and continued to respond to Respondent's July 7 telegram, in a timely manner.

Accordingly, on the basis of all the testimony and the documentary evidence, I conclude and find that the Respondent's discharge of Velez violated Sections 8(a)(1), (3) and (4) of the Act.

Withholding of Raise and April 1977 Suspension of Antanacio Martinez

Earlier in this decision, in the section captioned, "Luis Caban's Alleged Promise of Benefits to Antanacio Martinez," I conclude that Respondent promised Martinez a

raise predicated on his refraining from attending a union meeting at which a strike vote was to be taken. The facts involved in this issue have heretofore been set forth.

Upon receiving his paycheck, Martinez realized that he had not gotten a raise which had been promised to him. On August 13, 1976, Martinez complained to Caban, that he had not received the raise. Caban stated that he had given Martinez the raise and did not know what happened. He advised Martinez to talk to his foreman. Martinez went to Donald Wolbing and asked him why he had not received the raise. Wolbing denied knowing about it. Martinez stated that if Wolbing was his foreman, he should be aware of the raise. Thus, Martinez and Wolbing then went to speak with Caban and Wolbing told Martinez he would talk to Colosi. Wolbing returned sometime thereafter and told Martinez he would not be getting the raise. Martinez responded by stating to Wolbing that if he did not get the raise, he would not work overtime that day. Thereafter, Colosi joined them and told Martinez that he would not get the raise. When Martinez asked why, Colosi gave him no reason. Martinez repeated he would not work overtime and Colosi told him that he should go home and stay there, and he, Colosi, would consider Martinez to have quit. Martinez stated he was not quitting and that he had already put in a 40-hour work-week. Colosi told Martinez to go home and stay there. Martinez punched out and left the premises. Respondent's witness, Wolbing, foreman of the interlock department, testified that overtime at the Company is not mandatory.

On Monday, August 16, the employees went out on strike. Martinez participated in the strike by doing picket line duty from noon to 4 p.m. Later that week, Martinez went in to the Plant to get his paycheck. He spoke to Wolbing who told him that the doors were opened and that he could come back to work. Martinez inquired how he could return to work after Colosi had fired him. Wolbing responded that Martinez could come back to work whenever he wanted.

When the strike ended on August 20, Martinez called Caban to see if he could return to work in view of the fact that he believed Colosi had fired him. Caban told Martinez that Colosi said he had not fired Martinez and he could return to work. Martinez did return to work on August 23, still having not received the raise.

Caban testified that Martinez had caused him trouble at the union meeting. He admitted as a result of Martinez raising the alleged "bribe" at the union meeting, he, Caban told Colosi he wanted to withdraw the raise.

Colosi confirmed the fact that the reason he permitted Caban to withdraw Martinez' raise was because Caban told him Martinez had accused Caban of bribery at the August 5, union meeting.

I find that the Respondent's failure to grant Martinez the raise which was promised to him on August 4, violates Sections 8(a)(1) and (3) of the Act.

On April 25 or 26, 1977, at about 10:30 a.m., Martinez was approached by Colosi and Rosa, who told him to fix his hair net. Martinez told Colosi he had on his hair net and, his hair was short. Rosa then told Martinez to tuck a piece of hair into his net. Martinez asked Rosa why he had to fix his net when his hair was short. Rosa warned Martinez that he should do it because maybe they would fire him. Martinez responded, "if it is the case they want to fire me, they don't have to beat around bothering me with this, you know, telling me to have the hair net on in that manner, when my hair is cut short." The same day, after lunch, Rosa and Tino Hernandez approached Martinez at his work station. They advised him that he could not work if he did not fix his hair net. Martinez asked what could happen if only a little piece of hair was sticking out, and repeated that he was wearing the net and his hair was short. Hernandez told Martinez that a few days before he had sent an employee home because he did not like his hair cut and that if he were Martinez' foreman, he would send Martinez home. Martinez stated that since Hernandez was not his foreman, he should not come around telling him what to do.

Later that day, Rosa instructed Martinez to go home. When Martinez asked why, since he was wearing the net and doing his work, Rosa stated that these were the rules of the Company. Colosi and Hernandez then came to Martinez, and Colosi told him to go home. Martinez told Colosi to punch his card and Colosi said he would. Colosi then warned Martinez that if he did not call the next day, he would get a suspension, and if he did not call the day after, he would be fired for good. Martinez asked why he had to call in if he was already fired. Colosi did not respond to this question.

On the following day, Martinez received a telegram from Respondent stating that he was subject to a 3-day suspension pursuant to the progressive disciplinary system. Martinez returned to work April 29. A few days after returning to work, Rosa came up to Martinez and told him he could take off the net because his hair looked shorter, like he had gotten a hair cut over the week end. Martinez stated that he had not gotten a hair cut, and that when Rosa gave him the suspension he must have been sleeping, not to have noticed his hair was short.

Martinez, whose testimony I credit, testified that he had a piece of hair approximately 1 inch square sticking out of the hair net behind his ear. On the other hand, Rosa, Colosi and Hernandez, described the hair extending out from Martinez' hair net differently. I find their versions inconsistent and unreliable. Although that Colosi stated that Martinez was suspended for failure to wear the hair net, he explained at some length, descriptively, how Martinez' hair was dangling out from the net.

Based on the record evidence as a whole, I conclude that Respondent, in suspending Martinez, violated Sections 8(a)(1) and (3) of the Act. Counsel for the General Counsel argues that a Section 8(a)(4) violation should be found as well, based on the timing of the suspension. In my view, the record does not support this inference and I do not find a violation of Section 8(a)(4) of the Act.

The Discharges of William and Mario Negron

Both William and Mario Negron were active union supporters before and after the election. They both signed authorization cards and attended union meetings. William Negron was elected shop steward for the production employees, and as such, would deal with problems between rank-and-file employees and management on the average of four or five times per week.

Both brothers appeared and testified as witnesses for the General Counsel in the prior case. On the basis of William's testimony, the Respondent was found to have committed 8(a)(1) conduct by engaging in illegal interrogations and threats.

William Negron worked for the Respondent for 4½ years prior to his discharge on August 24, 1976. Mario worked for the Respondent for approximately 1½ years prior to his discharge on August 24, 1976.

William and Mario Negron participated in the strike against the Respondent during the week of August 16, 1976. Both performed picket line duty for the duration of the strike from 8 a.m. to 12 noon. On the first morning of the strike, they observed Bily focusing a camera and appearing to take pictures of the employees on the picket line, which is discussed *supra*.

William and Mario both went to the Plant on separate occasions to pick up their paychecks. They were each told by management that the doors were open and they could return to work whenever they wanted to.

Neither one returned to work on the Friday that the strike ended because the extruding department, where they both worked, was not scheduled to work on Friday. On Tuesday, August 24, William and Mario returned to the Plant at approximately 4 p.m. to see Bily. William, on behalf of Mario and himself, told Bily they would come to work on Wednesday. He was told by Bily that they should not come to work because they were already fired. The reason being, was that they did not call to explain their absences. William told Bily that he had not

shown up Monday or Tuesday because he was sick and he did not call because his telephone was out of order. William stated that he told Bily he had had problems with his telephone for some time and he did not use a pay telephone because he was too ill to walk two blocks to a pay telephone. He reminded Bily that he had told him that he could come back to work whenever he wanted. According to William's testimony, Bily responded he didn't care, that anyway, he was fired.

Louis Menendez, Grand Lodge Representative for the Union, who participated and assisted in negotiations, testified on behalf of the General Counsel. According to his testimony, he had a discussion with Colosi early in the morning on Friday, August 20. Menendez asked Colosi if employees were still free to return to the Plant and Colosi stated, yes. Menendez said he would take care of notifying people that the strike was officially over, i.e., he would notify the union business representative. Menendez, however, told Colosi that he had no way of contacting each employee about returning to work. Colosi responded that he would take the responsibility of notifying employees when to come back to work. Colosi denied discussing who would tell employees when to return. Colosi also testified that he, in fact, never did contact employees and tell them when to return to work. I discredit Colosi and credit Menendez' testimony relating to Colosi's responsibility of contacting the employees.

Bily testified that he decided to terminate Mario on August 23, the first Monday after the strike, and he decided to terminate William on Tuesday, August 24, for his failure to call in Monday or Tuesday. Neither Bily nor Colosi refute the fact that they did not wait to find out if the Negrons had valid reasons for not calling in before they were terminated. Respondent's defenses to these discharges is the failure on the part of William and Mario Negron to report for work on the Monday and Tuesday following the strike, and their failure to adhere to the Company's call-in rule. The Board, with the Courts approval, has already determined in the prior

case, that the Respondent violated Section 8(a)(1) and (5) by instituting and implementing said call-in rule. It therefore follows, that if the rule is bad from its inception, any individuals disciplined by the operation of the illegal rule must necessarily have been subjected to illegal discrimination. Although the Negrons may be entitled to a remedy by virtue of the holding in the prior case, I find that by the discharge of William and Mario Negron, Respondent has engaged in separate, independent violations of the Act.

Respondent introduced testimony by a representative of the Illinois Bell Telephone Company, to reflect that William Negron had never, in the past, reported his telephone to be out of order. In view of my conclusion that management made no effort to find out why the Negrons had not called in, I consider this testimony to be immaterial as to Respondent's motivation.

Respondent attempted to show that William Negron worked under an assumed name for the Fox Valley Company, subsequent to his discharge at Electri-Flex, in an effort to collect unemployment compensation benefits although he was employed. In an apparent further attempt to impeach the testimony of William Negron, the Respondent recalled Bruce Kinander to testify. He testified to an alleged encounter between himself and William Negron in the men's lavatory on August 1, 1977, shortly after Negron had testified. According to Kinander, Negron cursed at him and threatened to kill him. Negron was recalled to the stand and denied cursing or threatening Kinander, although he did remember encountering Kinander in the men's room. In my opinion, these matters would be more appropriately disposed of at the compliance stage of these proceedings.

I therefore conclude, that the evidence in total, demonstrates that Respondent used its call-in rule as a pretext to discharge William and Mario Negron in violation of Sections 8(a)(1), (3) and (4) of the Act.

Discharge of Teofilo Lopez

Teofilo Lopez was an employee of Respondent for approximately 11 years. As such, he was one of the Company's most senior, experienced and highest paid employees. Supervisor Bily praised his work as outstanding and characterized Lopez as dependable and reliable. Among his other duties, Lopez, from time to time, had the responsibility of training other operators on the equipment. At the time of his discharge, Lopez was the operator of the NRM machine.

In the prior proceeding, Lopez testified as a government witness regarding his union activity and several 8(a)(1) allegations. The record in that proceeding also reveals that Lopez was one of the three employees who originally contacted the Union and initiated the organizing campaign. After the litigation in the prior proceeding, Lopez continued to attend all of the union meetings.

In the section captioned "Alleged Independent 8(a)(1) Conduct" I found Lopez to have been the subject of 8(a)(1) conduct engaged in, by supervisor Jesse Garcia. The facts surrounding that incident will not be repeated here.

During the strike that began on August 16, 1976, Lopez did not work. He returned to work on Monday, August 24.

On Tuesday, August 25, at approximately 9 a.m., while Lopez was checking a problem with the plastic coating on the cable, Bily came to where he was standing near the water pump. Bily told Lopez that there was water on the floor and accused Lopez of not cleaning the screen or filter. Lopez told Bily he had cleaned the screen that morning and it was clean. Bily repeated several times, that Lopez had not cleaned the screen. According to the Lopez version, Bily took a warning ticket out of his pocket and held it up close in front of Lopez' face or eyes. Lopez took the ticket and threw it at Bily, where it fell on Bily's chest. Bily told Lopez to leave and then turned around and left the department. Lopez commenced to go back to work on the machine. Approximately 10 minutes later, according to Lopez' testimony, Colosi came to the extruding department where Lopez was working with two uniformed and one plain clothes policeman carrying a rifle. Colosi told the policemen, "That's him" and they took Lopez to Colosi's office. Union stewards Rosa and Marrero, and foreman Bily were present. Bruce Kinander arrived a short time later. Lopez stated that when the police asked Bily if he was going to file a complaint, Bily answered in the affirmative. According to Lopez, he was not allowed to explain his side of the story. The police put Lopez against the wall, searched him, handcuffed him and took him to the police station. After posting bond, Lopez was released.

According to Bily's version, on the morning of August 25, he had a conversation with his assistant, Larry Slad near the NRM machine when Slad pointed out that the screen was clogged and water was spilling over. Bily testified he then went to the tool room office and wrote out a warning ticket for Lopez and put it in his shirt pocket. Bily approached Lopez, told him to clean the screen and Lopez said that it had already been cleaned. Bily stated that Lopez would have to clean it as many times as it needs cleaning, or he would ruin the equipment and the run. According to Bily, Lopez responded that Bily should fire him, if he wanted to, and Bily replied that he did not want to fire him. He wants him to do his job. Bily told Lopez he was going to give him a warning ticket, took the ticket out of his shirt pocket and handed it to Lopez. Bily states that Lopez took the warning ticket with his left hand and hit him with that hand on the right side of his neck. According to Bily, Lopez held a guage in his right hand in a threatening manner. Bily testified he walked past the machine, shut it off and told Lopez to come up to the office. According to Bily, Lopez stood there hollering, "Fire me if you want" and waving the guage in the air.

The next day, Lopez called Bily and asked if he could come to work. Bily responded in the negative, and Lopez

asked why, but Bily again replied in the negative. Lopez then stated that he would file for unemployment compensation and Bily said that was fine.

Marrero testified that when he was waiting in Colosi's office that morning, he overheard Colosi ask Bily if he had a witness. Bily replied that he thought that the only one who saw the entire incident was Nelson Accevedo, but, that he thought Accevedo would not testify against Lopez. Then, in the presence of Marrero and Bily, Colosi called the police. Marrero also testified that when the police asked Bily if he wanted to sign a complaint against Lopez, Bily looked at Colosi, who indicated, "Yes" by nodding his head, and then Bily said he did want to press charges.

Marrero began an independent investigation by questioning employees as to whether they saw anything. Accevedo told him he saw Lopez take a paper and throw it at Bily. According to Marrero, Accevedo swore he did not see Lopez hit Bily. Marrero reported to Colosi what he had learned from Accevedo.

Accevedo testified he could not hear the conversation between Bily and Lopez because of the noise from the machines. He stated that he had a clear view of the two individuals from where he was working approximately 25 feet away. Accevedo testified that Bily and Lopez were engaging in loud conversation which drew his attention to the two men. He saw Bily take a yellow slip of paper out of his shirt pocket and hold it with two hands in front of Lopez' face, close to his eyes. According to Accevedo, Lopez took the paper with his left hand and threw it back at Bily where it fell on Bily's chest. Accevedo saw Bily then turn his back to Lopez and walk away. According to Accevedo, he did not see Lopez holding a guage in his hand or raise his hands over his head. Additionally, Accevedo testified that none of Respondent's management personnel ever asked him what he had observed or heard. He corroborated Marrero's testimony that Marrero asked him if he had seen what happened between Lopez and Bily to which Accevedo responded that he had.

The record amply demonstrates that water on the floor near the NRM machine has been an on-going problem of long-standing duration, and a condition that continues to exist. Employees and supervisors were both aware of the water problem and testified accordingly. A document which was received in evidence as General Counsel's Exhibit 29 reveals minutes of a safety committee meeting, dated January 19, 1977, and prepared by Bily. In the section relating to the extruding department, the statement appears, "Extend water grate in floor on NRM, too much water on floor all the time."

Bily acknowledged that in the course of his investigation, he did not at any time, ask Accevedo what he had observed. Colosi, who was also aware of the fact that Accevedo was an eye witness to the incident, made no effort to get Accevedo's version.

I credit Lopez' testimony as corroborated by Marrero and Accevedo. I find Bily's version of the incident, to be unreliable, and I specifically discredit him. In my opinion, this is but another attempt to harass a union adherent, who testified in the prior proceeding. In my view, Respondent exaggerated a minor incident, all out of proportion, to set up a pretext. Further, I discredit Colosi, whose testimony throughout the hearing relating to this allegation as well as others, is fraught with vagaries, inconsistencies, and magnifications. It is interesting to note, that Colosi impressed me similarly to the impression he made on the Administrative Law Judge in the prior proceeding, who recognized Colosi's propensity to exaggerate minor incidents into major ones, in a situation, not unlike the instant discharge. The incident was not serious enough to precipitate an immediate discharge of Lopez, rather, Respondent waited until the next day when Lopez called on the telephone. Colosi, in head-long haste, called the police, rather than the security guards, who were on the premises. It wasn't as if Lopez followed Bily to the office, intent on doing him bodily injury or harm, indeed Lopez had to be called to Colosi's office.

In my opinion, Respondent once again seized upon a minor incident and imbellished upon it with an eye towards ridding itself of another pro-union supporter. Accordingly, I am convinced by the preponderance of the evidence that Respondent's defense to the discharge of Lopez was violative of Sections 8(a)(1), (3) and (4) of the Act.

Discharge of Nelson Accevedo

Accevedo's tenure with the Respondent covered approximately 2½ years. For the greater part of his employment, he worked as a machine operator in the extruding department. Based on his ability and progress, in August of 1975, Accevedo was selected to learn to operate the machine on the night shift and unless he was assigned other work, he was responsible for cleaning the machine.

Accevedo signed a union authorization card prior to the election on August 7, 1975, and he attended union meetings. In the prior proceeding he was a witness of the General Counsel and testified about warning tickets which were issued to him after the Union won the election. On the basis of the evidence in the prior proceeding, the Board and Court found *inter alia*, that the warning notice—disciplinary system under which Accevedo received the warning tickets, violated Sections 8(a)(1), (3) and (5) of the Act and ordered that such system be rescinded and all written warning notices issued thereunder, and any discipline meted out pursuant thereto, be rescinded and any employees affected thereby, be made whole by Respondent. Additionally, he testified to interrogations which the Board found violative of Section 8(a)(1) of the Act, and he further testified to a conversation in which he was told by supervisor that the Company knew he was prounion. That later conversation was also determined to be violative of Section 8(a)(1) of the Act.

On April 28, 1976, Accevedo received a warning ticket from his supervisor Detrick. The remarks section of the warning ticket reflected that on March 4, 1976, Accevedo was the operator on a No. 5 extruder. Furthermore, on this date, at least seven cartons of conduit were improperly marked and it is the extruder operator's job to control his line. Accevedo questioned Detrick about this because he did not recall ever working with the packer responsible for the error. Accevedo requested that Detrick show him the production report, revealing that on the date in question he was the operator on the No. 5 extruder. Detrick told Accevedo he would show him the report the next day, but, Detrick failed to make the report available.

On June 22, 1976, Detrick presented Accevedo with a warning ticket because that morning Detrick had found the lock broken on the back door. Accevedo said he did not remember breaking the lock, but, Detrick recounted that on the previous night, he had seen Accevedo use the forks of a lift truck to raise the back door. Accevedo admitted using the forklift in the manner described, but, stated that the door was already raised three inches off the ground. Accevedo recognized, at the time, as well as during his testimony that it was a mistake to have used the forklift in such a manner, but, maintained that he did not break the lock because the door was raised off the ground. Accevedo received a 2-day suspension.

Accevedo testified that on the night in question, prior to his receiving the warning ticket, the regular lift truck driver was absent, and Detrick assigned him to drive. He recalled going through the door in question three times. He testified that the first two times, he raised and lowered the door by hand. The door was not locked when he raised it and he did not lock it when he lowered it. The final time he opened the door, he used a lift truck approximately 3 to 3:30 a.m. Thereafter, he saw someone, although he did not know who, lift truck to take garbage out through that same door. Prior to the termination of his shift at 7 a.m., no mention was made of the broken lock.

Accevedo attended the union meeting on August 5, 1976, and participated in the strike by doing picket line

duty from mid-night to 4 a.m. He was on the picket line on the morning of the first day of the strike and remembered seeing Detrick and Colosi watching the strikers on the line.

He returned to work on Monday, August 23, after the strike had ended.

Wednesday, August 25, Accevedo was the individual who witnessed the incident described earlier, which resulted in the discharge of Teofilo Lopez.

On the morning of August 27, Bily and his assistant Slad, approached Accevedo at his work station. Bily handed Accevedo a warning ticket, stating that the reason for the ticket was that Accevedo had not cleaned the line on the NRM on the day before and that since he had been warned before about such things, he was getting a suspension. After Accevedo read the ticket, he responded that he had only been told to clean the line on that occasion and it was three minutes before quitting time. Slad stated that he had told Accevedo that at some prior time to clean the top and bottom of the machine. Accevedo agreed that those were Slad's instructions, and that he had in fact cleaned the top and bottom of the machine. Slad responded that his instructions meant to clean the whole line. Accevedo explained that that was not his understanding and that Slad should have explained that to him. Accevedo left the premises and returned to work on the night shift after his suspension.

On the evening of October 5, 1976, when he reported to work, Accevedo learned from another employee that Detrick had pulled his time card. When Accevedo found Detrick, according to Accevedo's version, Detrick handed him a warning ticket dated October 4, and said, "Nelson, yesterday you didn't clean the cutter and the machine that pushes the cable is dirty too." Detrick added that the printer was also dirty. Accevedo responded that he had cleaned and replaced the printer himself. Further, he pointed out to Detrick, that Detrick knew he did not have enough time to clean the machine, because Detrick had sent him to perform grinding. Before performing the grinding operations, Accevedo cleaned the printer, Accevedo reminded Detrick that he had helped him clean the grinder before Accevedo went home on October 4. Detrick left the office.

When he returned, he told Accevedo, "I'm sorry that I can't do anything for you. I know that you're a good worker, and a good person, but, I couldn't do anything else because the factory has some rules and I have to comply with those rules. And this is the second time that you were given a ticket for not cleaning. For this reason I have to do it." Accevedo testified credibly, that after receiving the warning ticket on August 27, he was careful to seek help to clean the machine in the line. According to his testimony, on October 4, Accevedo had the least amount of help to perform his job since August 27. The warning notice which Accevedo received states on its face, that it is a final notice and he is being dismissed.

I regard the discharge of Accevedo as but another example of Respondent's continuous efforts to build a case against active union adherents by using as a vehicle, its discriminatory warning system. The evidence is unrefuted that Accevedo was well thought of by management and considered a valuable employee. Indeed, he was chosen to be trained to run the NRM machine to enable him to work or operate this machine at night. Furthermore, on a payroll change notice, reflecting a raise, foreman Bily and superintendent Bonner signed the payroll change notice and one of these named individuals made the notation, "This man has been very instrumental in the training of our night extruder operators and in keeping the packaging operation running smoothly."

I am convinced by the record evidence as a whole, that Accevedo's job performance did not warrant the issuance of the warning tickets nor justify his discharge. Accevedo impressed me as an extremely credible and reliable witness and I accept and give credence to the versions of the incidents giving rise to the warning tickets and the discharge. On the other hand, the

testimony of Detrick, I find to be vague and inexact. His memory was faulty and poor, even when presented with various exhibits to refresh his recollection. Much of his testimony was devoted to conjecture and speculation as to what he would have done or could have done in other circumstances, rather than what he actually did. I therefore discredit his testimony, particularly, where it is inconsistent with the testimony of Accevedo.

Although it is conceivable that Accevedo's discharge may be remedied under the Board's Order in the prior case with respect to the discriminatory warning system, I find that Accevedo's discharge herein, independently violates Sections 8(a)(3) and (4) of the Act.

Discharge of Martin Ibarra

Ibarra worked for Respondent for approximately 3 years. The last year of his employment was in the slitting department under foreman Gilberto Rosa. Prior to the union election in August, 1975, Ibarra had been a set-up man. On the morning of the election, Ibarra was transferred from set-up man to machine operator. The Board found in the prior case, that, the transfer was discriminatorily motivated because Ibarra had been seen by management representatives, including Colosi, distribution handbills on the morning of the election. The Board as affirmed by the Circuit Court, concluded that the transfer was violative of Sections 8(a)(1) and (3) of the Act. In the prior proceedings, Ibarra also testified about receiving warning tickets, most of them inspired by Colosi.

A few days after Ibarra testified in the prior proceeding, he was given the first of three or four warning tickets. Approximately ½ hour before presenting Ibarra with the warning ticket, Garcia, his foreman at that time, told Ibarra that Ibarra had testified against him in court, and he had to defend himself against anybody that attacked or offended him. In the prior proceeding, Ibarra had testified that Garcia interrogated him regarding his attendance at union

meetings. Ibarra was credited and the allegation was ultimately sustained both by the Board and the Court. On May 24, 1976, Ibarra was issued another warning ticket along with a 3-day suspension. This ticket was issued as a result of an accident Ibarra incurred on May 21. In an effort to prevent rolls of steel from falling, his hand was cut. The General Counsel contends that the Respondent's motives underlying the issuance of this warning ticket, were revealed by a conversation between Colosi and Marrero on the day of the accident. Said conversation is discussed earlier in this Decision under the section captioned, "Mario Colosi's conversation with Ignacio Marrero." I determined that the conversation violated Section 8(a)(1) of the Act, and I will not endeavor to reiterate the circumstances surrounding that conversation or the text of the conversation.

Subsequent to the last hearing, Ibarra continued in his efforts to support the Union. He attended union meetings, including the August 5 meeting where the strike vote was taken, and he performed picket line duty from 8 p.m. until midnight and also appeared for an hour each morning of the strike. During the instant proceeding he testified that on the morning of August 16, 1976, the first day of the strike, he noticed Colosi, Bily, Hernandez and Garcia observing employees at the picket line. He testified further, that he saw Bily with a camera and he believed Bily was taking pictures of the strikers.

When Ibarra went to the plant on August 18, to pick up his pay check, Colosi asked him through Caban, who was interpreting, why he did not come in to work and stated that the doors were open for him and everybody else whenever he wanted to return. Ibarra responded he did not want to go in to work because his fellow workers were on strike and he did not want to cross the picket line. Ibarra returned to work after the strike ended on Friday, August 20.

On Monday, December 6, and Tuesday, December 7, 1976, Ibarra did not appear at the Plant to work, nor

did he report his absences. On Wednesday, December 8, at about sometime prior to noon, Ibarra called the Company and spoke to his foreman, Rosa. Ibarra told Rosa that he would be back at work on Thursday, the next day. Rosa told him he should not report to work because Colosi had said Ibarra was fired because he was absent 3 days without calling in. Ibarra told Rosa that an emergency had arisen and he had to go to Florida, because a friend had called to tell him that his brother had been in an accident. He stated that in my view of the fact, he had to be there quickly, he did not have time to call in. In spite of his conversation with Rosa, Ibarra went to the plant on Thursday and spoke to Rosa at approximately 8 a.m., telling him he was ready for work. Rosa said he had to talk to Colosi first. They both went to Colosi's office where Luis Caban acted as a translator. Colosi told Ibarra that he was discharged for being absent 3 days without calling in. Ibarra explained that he learned on Saturday of his brother's accident and he had to leave for Florida on the spur of the moment. Ibarra wanted another chance, but, Colosi said he could not give him another chance, because then everybody would ask for the same. Then Colosi told Ibarra to talk to Marrero and if the Union decided Ibarra could continue working, it was fine with him.

Ibarra testified that he met with Marrero and explained the situation to him. Marrero told Ibarra that as far as the Union was concerned, he saw no problem. Marrero corroborated his discussion with Ibarra. Marrero testified that he believed Ibarra had been faced with an emergency and should be able to keep his job.

Marrero testified that he explained to Colosi and Rosa what Ibarra had told him and Colosi responded that he was sorry he knew Ibarra did good work but he can't give him a chance because then he would have to do the same thing for other employees. Marrero responded in effect, what was the point in Colosi's calling him into the office when nothing was accomplished. Colosi responded that he was sorry but, he has to go by the contract and Marrero asked what contract, commenting that there is

no contract. Colosi reiterated, showing Marrero a book and stating that he has a contract. He didn't know if Marrero had one, but, he, Colosi, had a contract and he goes by that contract.

Ibarra learned when he arrived home that day, that a telegram dated December 8, 1976, 1:25 p.m., had been delivered to him. The telegram from Bruce Kinander stated that Ibarra was being discharged for his absence on December 6 and 7, and failing to report for work on December 8, by 12 noon. The telegram further stated, that Ibarra failed to call or otherwise attempt to notify the Company of his absence or his reasons for being absent.

According to Colosi's testimony, Marrero told him that Ibarra admitted he was wrong, that he broke the call-in rule and there was no excuse and that Ibarra would like his job back. Colosi denied mentioning a contract. First, Colosi said that Ibarra did not explain why he went to Florida and Colosi said that he had to ask Ibarra why he went to Florida. Colosi then recanted that testimony, and stated he asked Ibarra why he did not call in and report his absence and Ibarra merely said he had gone to Florida. Colosi did admit however, that when a discharge telegram was sent to Ibarra, he did not know why Ibarra had not reported his absences. Colosi then took the position that Respondent did not discharge Ibarra until it had an opportunity to learn whether he had good cause for not calling in.

Respondent presented a witness, Geronimo Covarrubias. His testimony was designed to show that Ibarra went to Florida because he was to be paid money by a citrus grower, to transport individuals (labor) to Florida to pick fruit. Covarrubias constantly contradicted his own testimony and could not even remember when he allegedly told management of Ibarra's Florida trip. At another point in his testimony, he denied ever telling management or furnishing management with this information. After finally being pinned down, Covarrubias testified that he talked to Respondent's counsel prior to trial, but, not in relation to

the trial or to his testimony, he only appeared in Court because he received a subpoena. Several other inconsistencies appear in the record. I specifically discredit this witness' testimony.

I am convinced by the preponderance of the evidence, that Respondent discharged Ibarra because of his union activity and his participation in Board proceedings. The consent harassment, taking the form of warning tickets leading up to the pretextual discharge, has been its *modus operandi* throughout. The Respondent's defense to Ibarra's discharge is manufactured from the same mold as its defenses relating to the other individuals, both in the prior case and the instant case, who were held to be and are presently determined to be discriminatees.

When Ibarra called the Plant and spoke to Rosa, advising him he would report to work the next day, Rosa did not even question him as to the reason for his absence and why he had not called in. Rather, he was informed by Rosa that he was terminated. The telegram from Kinander was in error, because uncontradicted testimony reflects that Ibarra did report for work prior to noon, on December 8. Furthermore, no one confronted Ibarra with the alleged purpose of his Florida trip, i.e., to act as a transportation service for the citrus growers in Florida. Obviously, and the record is clear, when Ibarra was terminated, management had no idea why he had not called in, or the cause for his absences. Indeed, Colosi admitted that when the discharge telegram was sent to Ibarra, he did not know why Ibarra had not reported his absences. As stated earlier, I discredit the testimony of Covarrubias, but, even if he were to be credited, his testimony would be rendered meaningless, and irrelevant in view of the fact that Respondent had no idea why Ibarra was absent before deciding to discharge him. There is no dispute that Ibarra was absent on the days in question. The essential element is whether Respondent was discriminatorily motivated in the discharge of Ibarra, and I find that it was. I conclude and find that Respondent's acts in regard to the discharge of Ibarra were violative of Sections 8(a)(1), (3), and (4) of the Act.

Suspension of Leoncio Gonzales

At the time he testified, Gonzales had been working for the Respondent for approximately 2 years. Gonzales participated in the strike in August 1976, by performing picket line duty from 4 a.m. to 8 a.m. He testified of having seen Colosi, Caban, Bily, Detrick and his foreman Hernandez passing through the picket line.

Gonzales testified that sometime in February, 1977, between 7 and 9 p.m., he attended a tavern in Elgin, Illinois, called "Barney's." When he arrived at the tavern, Hernandez, a supervisor, was present and they greeted each other. Gonzales proceeded to play one of the slot machines. Hernandez and Gonzales engaged in conversation and Gonzales told Hernandez that he had just received a 25 cent raise. According to Gonzales, Hernandez responded that it was good Gonzales got the raise because the Union was spoiling everything, and that before the Union came, raises were always given and everything was better. Hernandez then made reference to a paper that any employee could pass around during free hours and get signatures from coworkers in order to decide about expelling the Union from the factory. Hernandez explained that he could not pass around such a paper because he was a foreman.

Hernandez denied making any of the statements as testified to by Gonzales. Respondent's position is that Gonzales sought to entrap Hernandez.

I conclude that Gonzales' version of the conversation at Barney's tavern is reliable and credible. I discredit Hernandez as I have done earlier in this Decision under the Section captioned "Hernandez' Threats to Gonzales."

I find that the statements attributed to Hernandez violate Section 8(a)(1) of the Act.

On March 14, 1977, Gonzales had an accident with the forklift and received a 3-day suspension. The details and circumstances surrounding this suspension were related earlier in the Section of this Decision captioned "Hernandez' Threat to Gonzales," and will not be repeated.

Gonzales testified to the above referred-to conversations on May 26, 1977. On June 30, 1977, Gonzales arrived at work at approximately 1:30 p.m. instead of his normal starting time which was 7 a.m. Caban asked him why he had not come to work earlier or called in. Gonzales stated that his car was out of commission, his ride to work did not pick him up, he had been feeling ill, and it was raining so hard he did not want to venture out to a public telephone to call in. Caban told Gonzales to go home and report back the next day at 7 a.m., but not to punch in until the front office determined whether he was going to get fired or remain on the job.

On the next day, July 1, Gonzales arrived at work at approximately 6:45 a.m. He asked Caban if he was going to put him to work or send him home. Caban told him to wait in the cafeteria for an answer. Gonzales waited in the cafeteria until approximately 9 a.m. at which time he decided to leave the cafeteria and find out what was going on. Gonzales found Caban at the tool room office and told them he had been waiting a long time for an answer and asked Caban what he was going to do. Caban told Gonzales to wait in the office while he got Jesse Garcia to take notes of their discussion. Eventually, a meeting was held in the tool room office attended by Caban, Brilz, Garcia, Marrero, Gonzales and a man who Gonzales could not identify. Caban asked Gonzales why he missed work, to which Gonzales explained what he had earlier, with reference to the car being in the garage and no way to get to work that morning. He also stated that he was sick and because of the heavy rain, he did not want to walk the distance to the public telephone. Gonzales explained that his brother-in-law came to his house for lunch at noon and then drove him to the garage where he picked up his automobile. He then proceeded directly to the Plant. Caban stated that the Company had rules and that he had to call before noon, Gonzales could not break the rules. Gonzales asked Caban what he was going to do with him, give him a job or "throw him out." Caban said he was going to throw him out. Then Gonzales told Caban that his wife was going to have a baby, that he had paid for insurance through the Company and he was worried about coverage for his wife. Caban stated that insurance would cover him for a month after he was fired. Gonzales then asked Caban for a statement so that he could collect unemployment, to which Caban refused. Caban told Gonzales to go home, they would let him know what they were going to do with him later.

Several days after this meeting, Gonzales received a telegram from Colosi as follows:

> "Our records indicate that you were previously suspended for failing to call to report your absence in accordance with Company rules. Therefore, your failure to call on June 30, 1977, would subject you to discharge, if not excused for valid reasons. While the reason you gave for not calling is sufficient to prevent your discharge at this time, it is not sufficient to excuse you from any disciplinary action. You are hereby notified that you are suspended for 5 days and should report back to work on Friday, July 8, 1977."

Counsel for Respondent did not cross-examine Gonzales in connection with the 8(a)(1), (3) and (4) allegations. Nor did Respondent present any witnesses to rebut Gonzales' testimony, rather, it relied on its affirmative answer which is described earlier.

The record is clear that Respondent conducted an investigation as to the reasons Gonzales came to work late without calling in. Indeed, the suspension telegram Colosi sent to Gonzales is evidence of Respondent's recognition that Gonzales had a valid reason and was justified in not calling the Company to report he would be late. More important, is the fact that the Board, with Court approval in the prior case, found that the call-in rule was illegal from its inception and that the warning and disciplinary system was equally invalid and violated Section 8(a)(5) of the Act. Therefore, putting all else aside, Gonzales was suspended pursuant to an illegal rule. Although his suspension may perhaps be remedied

under the original Board Order and Court Decree, I nevertheless, conclude that Respondent violated Sections 8(a)(1), (3) and (4) of the Act in this regard.

The Surface Bargaining Issue

Counsel for the General Counsel avers that Respondent refused to bargain in good faith with the Union by offering and insisting upon proposals patently unacceptable to the Union, including *inter alia*: a fixed contract expiration date, a very short duration, perhaps 5 months or less, depending on a date of execution of the contract; an overly broad management's rights clause; no wage increases for unit employees, other than merit increases and equalization of wage rates within job classification; no union security clause unless the Union could prove approximately 90 percent of the union employees were members of the Union' and the right of a Company official to accompany any union representatives while on Company premises.

The record is replete with testimony reflecting the dynamics and the nuances of discussions throughout 12 negotiating sessions. The only purpose to be served by my reiterating the details of the sessions, would be to lengthen an already long decision. Therefore, I will attempt to isolate those pertinent factors upon which I rely in making my decision.

The Parties commenced negotiations on September 26, 1975. At this meeting, a discussion ensued regarding the discharge of a shop committeeman, Dick Rose and an employee, Tony Capasso. This issue was not resolved and the Union proceeded to pass out their proposal. The Union advised the Company negotiator, that any agreements reached on proposals were tentative, and subject to ratification of the membership. It was agreed by the Parties, that language on non economic issues would be negotiated before wage proposals were presented. Apparently, after the meeting ended, the Parties agreed that the two individuals who had been discharged would be returned to work after a short suspension without backpay.

The next session was held on October 16, 1976. During the interim between the first and second session, charges had been filed by the Union and much of the second session was taken up with discussion concerning the various disciplinary actions taken by Respondent and the charges filed as a result thereof. Later, in this meeting, Respondent's negotiator passed out a Company proposal.

The third meeting was held on October 24, 1975. At this time, the Parties agreed to use the Respondent's proposals during the negotiation although the chief union negotiator stated that he wanted to make references to the union proposal.

Respondent proposed a management rights clause, which appears to have reserved to itself, authority over almost all terms and conditions of employment. The Union's chief negotiator characterized that proposal as the harshest management rights clause he had ever seen. There was no further discussion of the clause at this meeting.

During the next meeting, Respondent stated that there was no change in its management rights proposal and Respondent was unwilling to give a union shop. At the November 7, 1975 meeting, the union negotiator took the position that management rights was one of the main issues to be discussed and submitted a management's rights clause based on one it had in another contract. At the conclusion of this meeting, the union negotiator stated that since the Respondent still wanted its management rights clauses and no union shop, mediation was needed.

The next meeting was held on November 13, 1975, where the union negotiator again, attempted to discuss its proposed management rights clause, but, the Respondent's negotiator stated there was an impasse on that issue and on union security. After this meeting, the Union called in a federal mediator. The federal mediator was in attendance at the remaining seven negotiations sessions.

A meeting was held on December 4, 1975, where the Respondent rejected the Union's proposed management's right clause and the union negotiator proposed, excluding union security, management rights, arbitration and no-strike clauses from the contract. At the November 13 meeting, the Respondent took the position that the Union would have to demonstrate, that it had 90 percent of the employees before the Respondent would give union security. At a meeting on December 11, the Respondent again, took the position that there was no change on union security.

The Union's original proposal provided union access to the plant for administration of the contract to be arranged through the Industrial Relations department of the Company, and it not be unreasonably delayed or denied. Respondent's counter-proposal altered the language with respect to the purpose of access to be for "observing working conditions or assisting in the adjustment of grievances." Respondent added a clause, reserving to itself, the right to accompany any union representative during his stay on the premises. The Respondent agreed to insert language, stating that such permission would not be unreasonably withheld and the Union accepted the Respondent's provision with the revised language.

It was at the January 28, 1976, meeting, that the Respondent again, rejected any union shop proposal, but, would agree to dues check-off. Furthermore, the Union's management rights clause was again rejected and Respondent insisted on its own clause.

Respondent proposed, adding three paid holidays to the six paid holidays it had in the past. It rejected entirely, any general wage increase and would only agree to its submitted wage progression schedule with the "red circle" existing rates. Respondent adamantly insisted upon a 1-year contract. The Union took the position that it had lost on every proposal, and a 1-year proposal would make the contract expire on New Year's Eve, Respondent's slow period. At the meeting on July 14, 1976, Respondent took the position that the proposal for

1-year contract was now a contract from approximately January 1, 1976, to expire on December 31, 1976.

Respondent took the position that its current wage rates, compared favorably with area standards, and accordingly, it continued to reject the general wage increase.

On July 24, 1976, the Union held a meeting at which the Respondent's contract proposal was explained to, and rejected by, the employees who voted to strike.

Another meeting was held on August 4, 1976, in effort to avert the strike. The union negotiator read off a counter-proposals as follows: (1) the management rights clause as proposed by the Union on July 14; (2) the maintenance of membership clause as proposed by the Union on July 14; (3) check-off of dues as proposed by the Respondent' (4) Respondent's no-strike, no lockout clause if the reference to international representative were striken; (5) Respondent's arbitration clause; (6) Union would drop the demand for super seniority for the shop committee; (7) Respondent's proposal on holidays for the first year of the contract, and the second year of the contract permit a full day off for the day before Christmas and the day before New Years, this would add one more holiday in the second year of the contract; (8) Respondent's vacation proposal; (9) shift premiums of 25 cents for the second shift and 35 cents for the third shift with all employees on those shifts receiving the premiums; (10) Respondent's hours of work proposals; (11) Respondent's profit-sharing plan would be discontinued as of January 1, 1977; (12) Respondent's present pension plan; (13) Respondent's present insurance plan paid in full by Respondent for all employees and their dependents; (14) a 25 percent wage increase for all employees as of August 1, 1976. The Union took the position that inasmuch as the election had occurred almost a year before, and while a 25 percent wage increase sounded like a lot, the Union was dropping Respondent's profit-sharing plan. The profit-sharing plan had paid off 20 percent the prior year, thus, the Union viewed this as an increased labor cost of 5

percent; (15) 10 minutes rest periods as proposed by Respondent without any time set for the rest periods; (16) wage increase of 40 cents across the board as of August 1, 1977, and another 40 cents across the board wage increase as of August 1, 1978, a 3-year contract to expire on July 31, 1979.

After caucusing, the Respondent's negotiator repeated that its July 14 proposal was its final proposal, and Respondent was willing to take a strike on that proposal. The union negotiator responded that that proposal of July 14 was the same proposal Respondent gave last January.

The employees commenced to strike at 7 a.m., on Monday, August 16, 1976.

The bargaining sessions of July 14 and August 4, 1976, bring into sharp focus, Respondent's rigid adherence to proposals which it could have predicted, would be unacceptable to the Union.

Thus, the last session before January 28, 1976, had been held more than 6 months prior. Preceding that meeting, there had been nine negotiating sessions, the first two, of which had been basically an exchange of proposals and descriptions of the Union's insurance plans. For the next seven sessions, the Parties reviewed proposals based on Respondent's proposed contract. Although Respondent did agree to certain revisions and tentative agreement was reached on certain of Respondent's proposals, these clauses dealt with recognition and representation, military service, over-time and discrimination. While not minimizing their importance, these are hardly items going to the guts of a collective-bargaining agreement and did not touch on any substantial economic matter. The record of the negotiations, up until this January session, reveals little progress on significant issues which had been discussed and little progress. At the January 28 meeting, the Union, for the first time, presented its economic proposals among other things. This, despite the fact, that not all language proposals had been resolved. The only proposals of the

Union's package that Respondent would accept, were dues check-off, the arbitration clause, which the Union agreed would be Respondent's clause, and a retention of the Respondent's profit-sharing plan. Respondent rejected union security, management rights, hours of work and super seniority, and Respondent wanted to retain its current practice regarding vacations. Furthermore, Respondent demanded retention of its no-strike proposal. The request for two 10-minute rest periods was accepted by the Respondent, but it did not want the periods to be specified times during the day. Respondent offered three additional holidays and a shift premium. It should be noted that the shift premiums Respondent offered were less than the Union requested and were to be given only to employees transferred to the second or third shifts; not to newly hired employees on those shifts as the Union requested. Respondent demanded a 1-year contract.

When the Parties met again on July 14, 1976, Respondent repeated its final position of January 28. The Respondent continued to require that the contract expire on December 31, 1976, which would be less than 6 months from the date of this bargaining session.

The surface bargaining issue in this case, must be viewed against a backdrop of antiunion conduct and unfair labor practices seldom seen in such imposing array. Neither a prior Board Order, a Court Decree, or the pendency of the charges litigated herein, tempered Respondent's determined resolve to break the Union by engaging in flagrant violations of the Act. Thus, the Respondent, a proven recidivist, continued in its efforts to undermine the Union's status before and after the election, immediately prior to embarking upon collective-bargaining meetings, during "negotiations" and after negotiations ceased, immediately prior to the trial in the instant case, and while trial was actually in progress.

The passage of time, as evidenced by two more violative acts of conduct by the Respondent to be discussed, did not abridge Respondent's desire and intent to rid itself of the Union. The personnel file of unit

employee Elwin Nugent, who was hired on April 28, 1977, contains a note which states *inter alia*, "has always been a nonunion man." A personnel consultant, Lawrence J. Zimmerman, testified that he hired Nugent and admitted writing the note during a pre-hire interview. Zimmerman testified that he regularly visits the Plant and his duties include recruitment, screening, and recommending the hiring of unit employees. He has free access to the Plant, escorts perspective employees through the Plant, and at times, uses Kinander's office to interview perspective employees. According to Zimmerman's testimony Colosi had given him orders to tell applicants that there was a union in the Plant and that perspective employees who were not in the unit were free to join or not join the Union. I discredit Zimmerman in view of the fact that he was interviewing Nugent as a unit employee and the progress of negotiations on union security, was nil i.e., no union security. I therefore concluded that, Lawrence Zimmerman is an agent of Respondent and his conduct is attributable to it. Accordingly, I find that this is but another independent violation of Section 8(a)(1) of the Act.

As late as May 16, 1977, a week before the trial in the instant case, Respondent unilaterally promulgated a new disciplinary rule for employees who failed to wear safety glasses.

In this regard, the record reveals on that date a meeting was being conducted, a safety meeting for employees in three of Respondent's departments. While the meeting was in progress, Mario Colosi entered the meeting and stated that in the future, if he saw anyone anywhere in the Plant, except the cafeteria, without their safety glasses on, that employee would be suspended for an entire week without pay. Two employees testified about this meeting and stated further, that in the past they only had to wear their safety glasses while operating machines or actually performing work, and that they never before had been told they would receive a 5-day suspension for the failure to wear glasses.

It is Respondent's contention that this allegation does not rise to the level of unlawful unilateral action, and, as being simply deminimis should be dismissed. Although there is no evidence that the rule is actually enforced, I do not view this as dispositive. Rather, the fact that higher levels of management, neither disavowed or rescinded the rule and the discipline to be meted out in furtherance of same, leads me to the conclusion that Respondent has independently violated Section 8(a)(5) of the Act, by unilaterally instituting a disciplinary rule without bargaining with the Union as regards this mandatory subject. See, *Boland Marine and Manufacturing Company, Inc.*, 225 NLRB 824, 829.

The pattern of unlawful conduct engaged in, by the Respondent is similar to the pattern of conduct engaged in by the Respondents in *N.L.R.B. v. Herman Sausage Co., Inc.*, 275 F. 2d 229, and *Sweeney and Co. Inc.*, 176, NLRB 208 enf'd. impertinent part 437 F. 2d 1127 (C.A. 5, 1971), and *Albert Oldfield, d/b/a Oldfield Tire Sales*, 221 NLRB 1275. In those cases, as here, the employers engaged in independent violations of Section 8(a)(5) *inter alia*, thus, affording extraneous evidence indicative of an intent to undermine the Union which is contrary to the concept of good faith bargaining. In *Oldfield*, the Board concluded, pursuant to a stipulation, that Respondent had committed numerous violations of Section 8(a)(1) of the Act, both before and after the Union was certified and bargaining had begun. The issue to be resolved, was whether Respondent also violated Section 8(a)(5) of the Act, although ostensibly engaging in bargaining. The instant case presents another parallel with *Oldfield*, in that Respondent in *Oldfield* made remarks after the initial bargaining session reflecting an attitude antithetical to good faith bargaining. The Board and the Courts have long held that previous relations of the parties and events antecedent explain behavior at the bargaining table and the course of negotiations. This is the criteria used in determining good faith. See *M.R. & R Trucking Company* 178 NLRB 167 and *N.L.R.B. v. Truitt Manufacturing Company* 351 U.S. 149, 155.

Frank Haderly, the Union chief Negotiator testified about the first 11 negotiation meetings and Louis Menendez testified regarding the one negotiation meeting on July 14, 1976, where he was the principal union negotiator. In their testimony they refer to Respondent's minutes and Haderly's own handwritten notes. Respondent did not accept subject Harderly to cross-examination and I accept the testimony of both Haderly and Menendez as reliable and accurate accounts of what occurred at the negotiation sessions.

Respondent elicited testimony from an expert witness, John Bacon, who is a vice-president of an employer association in California. He testified generally as to his definition of good faith bargaining and how it relates to the instant case. I recognize that an expert may present opinion testimony where he is in a position to do so. I cannot accord his testimony any weight and deem it irrelevant because Bacon was not familar with the totality of the negotiations and the circumstances surrounding the same and in effect, he was arriving at legal conclusions which was not his role. The cases are legion that no two surface bargaining cases are alike and good faith can have meaning only as applied to the particular facts in a particular case. See, *American National Insurance Co.*, 343 U.S. 395, 410.

The Board has held that where an employer makes proposals which it could not have believed had any chance of acceptance and further, which would have required the Union to abdicate its representational rights and duties to the employees it represents, is contrary to the concept of good faith bargaining. *Gulf States Manufacturing Inc.*, 230 NLRB 81.

The Respondent, herein, by its prevasive unfair labor practices, including threats of reprisals, unilateral actions, discharges and other violative conduct, demonstrates to me that it had no intention of reaching agreement. See, *Bartlett-Collins Company*, 230 NLRB 18.

Furthermore, with regard to the unilateral action taken by the Respondent, the Board has held that an impasse is not reached where there was only surface bargaining. See, *Neon Sign Corporation*, 229 NLRB No. 125.

The Board's language in *Sweeney and Co., Inc., supra*, and *Borg-Warner Controls*, 198 NLRB 726, is applicable to the instant case. Respondent, in certain clauses of a proposed contract, provided for less than the existing terms and conditions of employment and rigidly held the line in other areas, for example union security. The Board concluded, *inter alia*, that the Respondent could only have anticipated that the Union would have great difficulty in accepting its proposals in reaching agreement. The Board stated, and I think the language applies equally to the instant case, "Based upon our analysis of Respondent's proposals, we are persuaded that they showed rigidity so intense as to warrant an inference that Respondent was seeking the avoidance, rather than the obtaining of an agreement." Moreover, the Board found in examining Respondent's totality of conduct, "The issue is not, as Respondent suggests, that Respondent did not make enough concessions. Rather, the issue is whether Respondent's approach to bargaining demonstrated an unyeilding rigidity during negotiations which made collective bargaining a futility. Respondent's unyeilding rigidity is clearly established both in terms of Respondent's substantive proposals and its conduct relative to the procedural considerations of the bargaining. Accordingly, the totality of Respondent's conduct during its bargaining, compels the conclusion that Respondent only went through the elaborate motions of bargaining and adapted its tactics to its own ends with no sincere desire of reaching an agreement."

Accordingly, viewing the totality of Respondent's conduct, I find that it was engaging in surface bargaining without a good faith intention of reaching an agreement in violation of Sections 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time production and maintenance employees employed at the employer's facility currently located at 222 West Central Avenue, Roselle, Illinois 60172, excluding office clerical employees, professional employees, administrative employees, managerial employees, guards and supervisors as defined in the Act.

4. As certified by the National Labor Relations Board on August 15, 1975, the Union is the exclusive representative of the employees in the aforesaid unit, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

5. By interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By discharging Adrian Velez, William Negron, Mario Negron, Teofilo Lopez, Nelson Accevedo, and Martin Ibarra, for reasons of their activity on behalf of, or their support of the Union, or because they filed charges and/or participated in National Labor Relations Board proceedings, the Respondent has engaged in unlawful conduct within the meaning of Sections 8(a)(1), (3), and (4) of the Act.

7. By withholding a raise and suspending Atanacio Martinez for reasons of his union activity on behalf of, or his support of the Union, the Respondent has engaged in unlawful conduct within the meaning of Sections 8(a)(1) and (3) of the Act.

8. By the suspension of Leoncio Gonzales, by reason of his activity on behalf of or his support of the Union, or because he participated in National Labor Relations Board proceedings, the Respondent has engaged in unlawful conduct within the meaning of Sections 8(a)(1), (3), and (4) of the Act.

9. By refusing to bargain collectively in good faith, concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union, as the exclusive representative of its employees in the aforesaid unit, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(5) and (1) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in the unfair labor practices set forth above, I recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act as follows:

Having found that the Respondent, by promises of benefits, threats, interrogation, surveillance and creating the impression of surveillance, has interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act, I shall recommend that the Respondent cease and desist therefrom.

Having found that the Respondent discriminatorily discharged employees Adrian Velez, William Negron, Mario Negron, Teofilo Lopez, Nelson Accevedo and Martin Ibarra, it is recommended that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. In addition, I recommend that the Respondent make each of them whole for any loss each may have suffered by reason of the discrimination against each, by

payment to each, a sum of money equal to that which they would normally have earned from the date of discharge, less net earnings during said period. Backpay shall be computed according to *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977). (See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 1962).

Having found further, that Respondent discriminatorily suspended Atanacio Martinez and Leoncio Gonzales and withheld Martinez' raise, I recommend that the Respondent make each of them whole for any loss they may have suffered, by reason of this discrimination against them, by payment to each, a sum equal to what they would have normally received from the dates of their suspensions until they were fully reinstated by Respondent, less any interim net earnings. Backpay is to be computed as set forth above.

I will also recommend that Respondent expunge from its personnel or other files, any reference to employees' union affiliation or lack of same, and that Respondent cease and desist from asking job applicants their sentiments or utilizing the services of agents to ask perspective employees or job applicants their union sentiments or affiliation. Having also found that Respondent has refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist from such unlawful conduct, and affirmatively, that Respondent bargain in good faith with the Union upon request.

So that the employees in the bargaining unit may enjoy a year of good faith bargaining, and not be deprived of the services of the Union as their collective bargaining agent, for the period provided by law, I shall recommend that the initial period of certification be construed as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See, *Mar-Jac Company, Inc.*, 136 NLRB 785, *King Radio Corporation*, 172 NLRB 1051, *Beryl Chevrolete, Inc.*, 221 NLRB 810.

Further, having found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally establishing a new disciplinary policy for failure to wear safety glasses in the Plant, it is recommended that such policy be rescinded and withdrawn.

In view of the nature of the unfair labor practices herein found, including serious, substantial and pervasive interference, coercion, restraint, and discrimination, going to the very heart of the Act, there exist the danger of commission by the Respondent of other unfair labor practices prescribed by the Act. Accordingly, I recommend that Respondent be directed to cease and desist from in any other manner, infringing upon the rights guaranteed in Section 7 of the Act.

The transcript in the instant proceeding is corrected in accordance with Counsel for the General Counsel's Motion To Correct Transcript and their Erata To Motion To Correct Transcript with the exception of No. 64, Page 654, Line 6. The Record is correct in that respect.

On the basis of the foregoing findings of fact, and the conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommendation:[12]

ORDER

The Respondent, Electri-Flex Company, of Roselle, Illinois, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Promising benefits to employees if they refrain from engaging in union activities.

[12] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Threatening employees with reprisals, for engaging in, union activities.

(c) Threatening employees with loss of benefits for engaging in union activities.

(d) Threatening employees with loss of employment, Plant relocation or Plant closure, for engaging in union activities.

(e) Threatening employees for filing charges and/or participating in Labor Board proceedings.

(f) Interrogating employees about their union activities.

(g) Engaging in surveillance or creating the impression of surveillance of employees' union activities.

(h) Discharging and suspending employees because of their union activities.

(i) Refusing to grant wage increases to employees because of their union activities.

(j) Discharging and suspending employees because they have filed charges, given testimony and/or participated in Labor Board proceedings.

(k) Unilaterally establishing a new disciplinary policy for the failure of employees to wear safety glasses in the Plant without notice to and bargaining with the Union.

(l) Failing and refusing to bargain in good faith with the Union as the exclusive collective bargaining representative of all Respondent's full-time and regular part-time production and mainvenance employees.

(m) Engaging in surface bargaining or other bargaining not in good faith, without any real intention of reaching agreement with the Union as the exclusive collective bargaining representative in the unit described above.

(n) In any other manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Offer Adrian Velez, William Negron, Mario Negron, Teofilo Lopez, Nelson Accevedo, and Martin Ibarra, immediate and full reinstatement to their former positions, or if such positions no longer exist, to positions which are substantially equivalent thereto, without prejudice to any seniority or other rights and privileges. Make whole the following employees for any loss of earnings caused by Respondent's unfair labor practices:

Adrian Velez	William Negron
Mario Negron	Teofilo Lopez
Nelson Accevedo	Martin Ibarra
Atanacio Martinez	Leoncio Gonzales

Martinez should be made whole as to the wage increase he was granted, which was subsequently rescinded in August, 1976, as well as for earnings, lost as a result of his disciplinary suspension in April, 1977. The individuals should be made whole in accordance with the recommendation set forth in the "Remedy" in this Decision.

(b) Upon request, bargain in good faith with District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO, as the collective bargaining representative of Respondent's employees in the unit described above. The collective bargaining period shall commence from the date when Respondent commences to bargain in good faith and the union certification with regard to the aforesaid unit, should be extended for a period of 1 year from the date when Respondent commences in good faith with the Union.

(c) Upon request, promptly furnish to the Union, a list of all persons currently employed in the aforesaid unit, consisting of their full names, residence addresses, job classification, dates of hire and rates of pay, and keep said list current for the 1-year period referred to above.

(d) Upon request, furnish reasonable and adequate access to the Union, to all bulletin boards on our premises where the unit employees are employed, upon which notices to employees are normally posted, for a period of 1 year, for the purpose of posting and communicating to said employees, lawful union organizational materials and matters.

(e) Post at its Plant in Roselle, Illinois, copies of the Notice attached hereto, in both English and Spanish and mark "Appendix."[13] Copies of said Notice in both English and Spanish on forms furnished by the Regional Director for Region 13, shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and maintained by it, for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material. In addition, Respondent should be required to mail copies of the English and Spanish Notices To Employees at their homes.

(f) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C., April 14, 1978.

/s/ BRUCE C. NASDOR
Administrative Law Judge

[13] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ELECTRI-FLEX COMPANY and DISTRICT NO. 122, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO	Cases 13-CA-15687, 13-CA-16353, and 13-CA-16654

DECISION AND ORDER

On April 14, 1978, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions

[1] The Administrative Law Judge's Decision contains a number of inadvertent errors, apparently typographical in nature. We hereby correct those mistakes which are significant but which in no way affect his Decision nor our adoption thereof. In the second sentence of the last paragraph of the section entitled "Caban's Alleged Threat to Perez," "Perez" should be replaced by "Caban"; in the second sentence of the eighth paragraph under the title "The Discharge of Adrian Velez," the word "secured" should be substituted for "severed"; and in the first sentence of the fourth paragraph of the section entitled "The Surface Bargaining Issue," the date should be "1975" and not "1976."

In addition, we hereby correct certain findings of fact to which the Respondent has excepted but which do not affect the Administrative Law Judge's ultimate conclusions. In the section of his Decision entitled "Alleged Surveillance of

(Footnote continued on following page)

of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

[1] *continued*
Picketing," the Administrative Law Judge stated that there was no evidence, other than Supervisor Bob Bily's testimony, that the egress of trucks was blocked by the strikers' picket line. Contrary to this statement in the Administrative Law Judge's Decision, the record reveals that Bily's testimony was corroborated by that of Plant Superintendent Mario Colosi. Colosi's testimony was, however, generally discredited by the Administrative Law Judge. The Administrative Law Judge also incorrectly found, under his heading "Discharge of Martin Ibarra," that the discharge telegram to Ibarra was "in error" based on "uncontradicted testimony" that he (Ibarra) reported for work prior to noon on December 8, 1976. According to the testimony of both Ibarra and Supervisor Gilberto Rosa, Ibarra reported to work on December 9, 1976. This mistake, however, does not affect the validity of the Administrative Law Judge's conclusion that Ibarra was discriminatorily discharged.

Further, while we agree with the Administrative Law Judge's conclusion that the Respondent engaged in surface bargaining in violation of Sec. 8(a)(5) and (1) of the Act, we find it necessary to correct the Administrative Law Judge's factual discussion of one of the cases cited in support of his finding and to comment on his legal interpretation of others. First, contrary to the statement made in the Administrative Law Judge's Decision, *Sweeney & Co., Inc.*, 176 NLRB 208 (1969), enfd. in pertinent part 437 F.2d 1127 (C.A. 5, 1971), one of the cases cited for the proposition that independent violations of Sec. 8(a)(5) of the Act afford extraneous evidence of a lack of good-faith bargaining does not involve an independent 8(a)(5) violation. Second, the Administrative Law Judge in one instance, while paraphrasing Board and court case law on the issue of determining whether or not a party has bargained in good faith, appears to have inadvertently changed the emphasis of the original statements contained in the cited cases. Contrary to the Administrative Law Judge's version, the Board, in *M.R. & R. Trucking Company*, 178 NLRB 167 (1969), quoting from the concurring and dissenting opinion of Justice Frankfurter in *N.L.R.B. v. Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956), stated that, " 'the previous relations of the parties, antecedent events explaining behavior at the bargaining table and the course of negotiations' all form part of the fabric of the evidence on which the judgment [a determination of the Respondent's state of mind] must ul-

(Footnote continued on following page)

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Electri-Flex Company, Roselle, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:[2]

1. Insert the following as paragraph 1(n) and reletter the subsequent paragraph accordingly:

"(n) Asking prospective employees, while being interviewed, about their union sentiments."

[1] *continued*
timately be based." Neither the above correction nor comment affects the validity of the Administrative Law Judge's ultimate conclusion.

The Respondent has alleged that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We shall conform the Administrative Law Judge's recommended Order with his findings and also conform his notice more closely with his recommended Order.

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Destroy any references in the employees' personnel files as to whether or not an employee is for or against the Union."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 29, 1978.

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Following a hearing in which the Company and the General Counsel of the National Labor Relations Board participated and offered evidence, it has been found that we violated the Act. We have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT promise benefits to employees for not engaging in union activities.

WE WILL NOT threaten employees with reprisals for engaging in union activities.

WE WILL NOT threaten employees with loss of benefits for engaging in union activities.

WE WILL NOT threaten employees with loss of employment, plant relocation, or plant closure for engaging in union activities.

WE WILL NOT threaten employees for filing charges and/or participating in Labor Board proceedings.

WE WILL NOT question employees about their union activities.

WE WILL NOT create the impression that we are engaging in, or engage in, surveillance of employees' union activities.

WE WILL NOT discharge or suspend employees because of their union activities.

WE WILL NOT refuse to grant wage increases to employees because of their union activities.

WE WILL NOT discharge or suspend employees because they have filed charges, given testimony, and/or participated in Labor Board proceedings.

WE WILL NOT establish disciplinary policies for the failure of employees to wear safety glasses in the plant unless we give notice to, and bargain with, the Union.

WE WILL NOT fail or refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of all of Respondent's full-time and regular part-time production and maintenance employees.

WE WILL NOT engage in "surface bargaining" or other bargaining not in good faith, without any real intention of reaching an agreement with the Union as the exclusive representative of the employees in the unit referred to above.

WE WILL NOT ask prospective employees, while being interviewed, about their union sentiments.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, upon request, bargain in good faith with the Union as the representative of the employees in the unit referred to above. The collective-bargaining period will begin from the date when we commence to bargain in good faith and the Union's certification will be extended for a period of 1 year from the date when we begin to bargain in good faith with the Union.

WE WILL, upon request, promptly furnish to the Union, a list of all persons currently employed in the aforesaid unit consisting of their full names, residence addresses, job classifications, dates of hire, and rates of pay, and keep said list current for the 1-year period.

WE WILL, upon request, furnish reasonable and adequate access to the Union to all bulletin boards on our premises where the unit employees are employed, upon which notices to employees are normally posted for a period of 1 year for the purpose of posting and communicating to said employees, lawful union organizational materials and matters.

WE WILL offer reinstatement to Adrian Velez, William Negron, Mario Negron, Teofilo Lopez, Nelson Accavedo, and Martin Ibarra, to their former positions, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL reimburse Adrian Velez, William Negron, Mario Negron, Teofilo Lopez, Nelson Accavedo, Martin Ibarra, Antancio Martinez, and Leoncio Gonzales for the pay they lost as a result of our unfair labor practices, with interest.

WE WILL destroy any references in employees' personnel files as to whether or not an employee is for or against the Union.

ELECTRI-FLEX COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312—353—7597.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Argued September 12, 1979

November 14, 1979

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

ELECTRI-FLEX COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 78-2506

On Petition to Review an Order of the National Labor Relations Board

ORDER

[Unpublished Order Not To Be Cited Per Circuit Rule 35]

This case comes to us on a petition of Electri-Flex Company ("the Company") to review and set aside an order issued on September 29, 1978 by the National Labor Relations Board, which adopted the recommended order of the Administrative Law Judge ("ALJ"). The ALJ concluded that the Company committed numerous violations of sections 8(a)(1), (3), (4), and (5). The Board has filed a cross-application for enforcement of its order.

This is the second occasion that the clashes between the Company and the Union employees have been scrutinized by this court. In June 1975 the Union[1] began

[1] District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO.

an organizational campaign and on August 15, 1975, following a successful election, was certified as the bargaining representative of the Company's production and maintenance employees. On September 26, 1975 negotiations for a collective bargaining agreement began and continued until August 1976, when the Union went out on a week-long strike. In *Electri-Flex Co. v. NLRB*, 570 F.2d 1327 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978) ("*Electri-Flex I*"), this court affirmed the Board's findings that the Company violated sections 8(a)(1), (3), (4), and (5) of the Act during the course of the Union's election campaign and the early contract negotiations.[2] In this case the events which provide the basis for the Board's findings of violations occurred, in most part, during the period between the conclusions of the Board hearing in *Electri-Flex I* in May 1976 and the February 1978 issuance of this court's decision in that case. Because we find that the Board's determinations are amply supported by the evidence, the Board's application of enforcement of its order is granted.

I

The Company challenges the Board's findings that it violated section 8(a)(3) of the Act by discharging employees Adrian Velez, William Negron, Teofilo Lopez, and Michael Ibarra and by suspending Leoncio Gonzales. It argues that the evidence does not support the

[2] Specifically, we held that there was substantial evidence to support the Board's findings that the Company: (1) interfered with, restrained, and coerced the employees in their unionization efforts, in violation of section 8(a)(1); (2) discriminatorily transferred Adrian Velez and Martin Ibarra and discriminatorily discharged Juan Martin and Tony Capasso, in violation of sections 8(a)(3) and (4); (3) implemented a written warning notice-disciplinary system without bargaining with the Union, in violation of section 8(a)(5), and for the purposes of discouraging union activity, in violation of section 8(a)(3); (4) implemented a call-in rule which required employees to report by a specified time if they were going to be absent, in violation of section 8(a)(5); and (5) used a sixty-day probation provision, in violation of sections 8(a)(5) and (3).

Board's determination that a discriminatory motive was behind the Company's actions and thus, under the rule in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Board's order with respect to these violations must be set aside.

An employer violates section 8(a)(3) of the Act by discharging employees because of their union activities. In ascertaining this motivation, the Board may consider both circumstantial and direct evidence. While it is the duty of this court to determine whether there is substantial evidence on the record as a whole to support the Board's decision, "the decision is entitled to judicial affirmance, 'even though the court would justifiably have made a different choice had the matter been before it de novo.'" *Electri-Flex I, supra*, 570 F.2d at 1331, *citing Universal Camera Corp. v. NLRB, supra*, 340 U.S. at 488. Additionally, courts have consistently given broad discretion to ALJs in making credibility determinations. *See, e.g., Sarkes Tarzian, Inc. v. NLRB*, 374 F.2d 736, 736 (7th Cir. 1976); *Electri-Flex I, supra*, 570 F.2d at 1331-32.

Having reviewed the findings of discriminatory discharge and suspension and applying the principles stated above to the facts in this case, we are compelled to conclude that there is substantial evidence in the record as a whole to permit enforcement. We highlight this evidence below:

Velez

The record reveals that in 1975 Velez was an active participant in the Union's early organizational efforts; he distributed union materials in front of the plant and acted as a union observer at the union election. In April 1976 he testified on his own behalf in support of various sections 8(a)(1) and (3) violations. As a result of his testimony, the Company was found to have transferred Velez to another job for the purpose of discouraging him from engaging in union activities. *Electri-Flex I, supra*, 570 F.2d at 1332. Shortly after this testimony was given

the Company began a course of discriminatory conduct which indicates that the Company was attempting to get rid of Velez permanently. It began with harassing Velez about the length of his hair and requiring him to wear a hairnet. Testimony revealed that the Company's hair-length rule had previously been enforced in a lax fashion. It ended approximately two months later when Velez was discharged by the Company after a dispute involving absenteeism from work. Velez injured his back in a job-related accident. The Company testified that Velez was discharged because he failed to adhere to the call-in rule during his absence.[3] The ALJ specifically credited the testimony of Velez, which was corroborated by Negron, his acting foreman, that Velez had reported his absences in a timely manner.

Negron

Like Velez, Negron was an active Union supporter and testified as a witness for the Board's general counsel in *Electri-Flex I*. He also participated in the August 1976 strike against the Company. Shortly thereafter the Company fired Negron. The record shows that Negron did not report for work on the first Monday after the strike ended. He testified that his telephone was out of order and he was too ill to walk to a pay telephone. The

[3] According to Company policy, employees were required to report by a specified time if they were going to be absent. The testimony before the ALJ revealed that if an employee fails to call in within four hours after the start of his shift, he receives a warning slip; if he does not call in at all during the day, he is suspended for three days; and if he does not call in within four hours after the start of his shift on the following day, he is discharged. According to the testimony of a Company representative, the rule is discretionary and an employee may avoid discipline if he provides a valid reason for his failure to report his absence at work. Because of this, the Company attempts to contact the absent employee or wait for him to provide an excuse before reaching a determination on discipline. In *Electri-Flex I, supra*, 570 F.2d at 1337, it was held that the implementation of the call-in rule violated section 8(a)(5).

following day he appeared at the plant to notify the Company that he would come back to work on Wednesday. He was told that he was fired for failure to abide by the Company's call-in policy. The ALJ credited the testimony of a union representative that the Company promised to notify employees when to return to work. Negron's supervisor, Robert Bily, admitted, however, that he did not attempt to get in touch with Negron nor wait to find out if Negron had a legitimate reason for not calling in before he made the decision to discharge Negron. The ALJ indicated that testimony by a representative of the telephone company that Negron had never reported in the past his telephone out of order was immaterial to the Company's motivation.

The Company's primary disagreement with the Board's finding that the Company used its call-in rule as a pretext to allow it to discharge Negron is grounded on a statement made by the ALJ in his recommended order. Therein, the ALJ noted that because we held that the implementation of the call-in rule was illegal under section 8(a)(5), "it therefore follows that if the rule is bad from its inception, any individuals disciplined by operation of the illegal rule must necessarily have been subjected to illegal discrimination." The Company argues that the ALJ erred in determining that the Company's action relating to call-in rule infractions are automatically tainted because of our prior action. We agree with petitioner that this section 8(a)(5) violation does not "necessarily" offend section 8(a)(3) of the Act. A reversal of the Board's finding is not warranted, however, because there is substantial independent evidence that discriminatory motivation was behind invoking the rule in Negron's case.

Lopez

As to Lopez, the record shows that he was employed by the Company for approximately eleven years before his discharge. A Company supervisor testified that Lopez was a dependable employee. Lopez was one of the three employees who originally contacted the Union and

commenced the organizing campaign in the summer of 1975. During the strike that occurred in August 1976 Lopez did not work; the Company terminated him a few days later. Lopez returned to the plant on the Monday after the strike ended. The following day Lopez and supervisor Bily engaged in a verbal altercation after Bily accused Lopez of failing to adequately clean a water pump located in the plant. Lopez told Bily that he had cleaned the pump. Bily took a warning ticket out of his pocket and clutched it in front of Lopez' face. Lopez took the ticket and threw it at Bily. Bily told Lopez to leave. Bily then left the department and Lopez continued working. The incident, however, was not over. Ten minutes after Bily left the area where Lopez was working, the Company summoned the police—rather than the security guards who were on the premises—to the plant. Lopez was searched, handcuffed and taken to the police station. Later he was released on bond. The next day Lopez called Bily to ask if he could report to work; Bily responded in the negative. In support of its determination that the Company's action violated section 8(a)(3), the ALJ credited the testimony of the employee which indicated that the incident was relatively minor. Specifically, he found that the Company exaggerated the incident to enable it to rid itself of a Union activist.

Ibarra

At the time of his discharge, Martin Ibarra had been employed by the Company for approximately three years. Ibarra had testified in the prior proceeding against the Company concerning his transfer on the morning of the Union election from set-up man to machine operator. The transfer was held to violate section 8(a)(3). *Electri-Flex, supra,* 570 F.2d at 1332. A few days after Ibarra gave his testimony, he received several warning tickets relating to safety violations from his foreman, Jesse Garcia. Prior to issuing these tickets Garcia told Ibarra that he [Garcia] had to defend himself against anyone who attacked or offended him. The record reveals that at the prior proceeding Ibarra

had testified that Garcia interrogated him concerning his attendance at Union meetings. Ibarra continued to play an active role in Union activities. He participated in the plant strike and returned to work after the strike ended. In December 1976 Ibarra was discharged following his absence from work for three days without calling in. According to Ibarra, an emergency situation had arisen in Florida and he was unable to report that he would be absent before leaving. On the second day of his absence, the Company, acting with tremendous haste, decided that a separation notice should be written for Ibarra. On the morning of the third day of his absence, Ibarra called the Company and stated that he would report to work the following morning. He was told by his foreman that he was terminated. That afternoon Ibarra received a telegram from the Company that stated he was being discharged for failing to notify the Company of his absence. The decision to discharge Ibarra was made by the Company without knowing the reason for his failure to appear at work or having attempted to contact him, even though the Company's policy was to try to get in touch with an employee or wait for an excuse before discharging him. The Company presented evidence that Ibarra had no valid reason for failing to report his absence because he went to Florida to earn income for transporting workers to the state to pick fruit. In addition to specifically discrediting this evidence, the ALJ found it irrelevant to the question whether the Company's decision to discharge Ibarra was discriminatorily motivated.

Gonzales

Lastly, we turn to the suspension of Gonzales. Gonzales participated in the August 1976 strike and testified in the *Electri-Flex I* proceeding. Approximately one month after giving his testimony, Gonzales was suspended for failing to comply with the call-in rule. On June 30, 1977 Gonzales arrived at work at 1:30 p.m.—six and one-half hours late. When asked why he had not come to work on time or called in, Gonzales replied that

his car was not operating and that his ride to work failed to pick him up. He also stated that he was feeling ill, and it was raining so hard that he did not want to venture outside to a public telephone to report his absence. He was instructed to go home and report back on the following day at the normal time but not to punch in until the "front office" determined whether he would be discharged or would remain on the job. The next morning Garcia reported to work on time. Following a meeting with his supervisors, Gonzales was again instructed to go home and wait for the Company's decision concerning his employment status. Several days later he received a telegram from the Company stating the reasons he gave for not calling in were sufficient to prevent his discharge but were not sufficient to excuse him from suspension. Accordingly, he was suspended for a period of five days. At the hearing before the ALJ, counsel for the Company did not cross-examine Gonzales in regard to the discriminatory suspension allegation nor did the Company rebut Gonzales' testimony. In support of the determination of discriminatory motive, the ALJ noted that the Company itself recognized that Gonzales had a valid reason for coming to work late without reporting his absence. The ALJ also noted that Gonzales was disciplined pursuant to the illegal call-in rule.

As we stated earlier in regard to the discharge of Negron, we do not believe that by disciplining an employee pursuant to a rule that violates section 8(a)(5), an employer automatically violates section 8(a)(3). We are satisfied, however, that there is substantial evidence in the record to support the Board's finding that the call-in rule was used by the Company as a way of justifying its suspension of Gonzales.

For the sake of brevity, we have highlighted the circumstances surrounding these incidents. In conclusion, we believe that the timing of the discharges and suspension, coming as they did shortly after the employees' testimony in *Electri-Flex I*, the manner in which the Company's actions were effectuated, and the various sections 8(a)(1) and (5) violations that occurred

simultaneously, all lend substantial evidentiary support to the Board's determination in regard to the section 8(a)(3) violations.[4]

II

Petitioner also challenges the Board's finding that the Company refused to bargain in good faith in violation of sections 8(a)(5) and (1) of the Act. Specifically, the Board adopted the ALJ's conclusion that the Company engaged in surface bargaining by "offering and insisting upon proposals patently unacceptable to the Union."

In a situation like this—where the employer engaged in numerous rounds of bargaining with the Union—the question is whether "the employer's conduct at the bargaining table demonstrated that it was not negotiating in good faith." *NLRB v. Wright Motors, Inc.*, No. 78-2340, slip op. at 6 (7th Cir. July 16, 1979). Decision of this question is not easy because it requires ascertaining the employer's state of mind. Moreover, a tension exists between the statutory obligation to bargain in good faith and the proviso that "such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." Section 8(d).

The ALJ conducted an exhaustive examination of the evidence and concluded that the Company engaged in sham bargaining. This conclusion is fully supported on the record. On September 26, 1975 the Union called on the Company to bargain; on August 16, 1976 the employees went out on strike. During this eleven-month period, twelve negotiating sessions occurred. The ALJ

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[4] The Company argues that, even if it discriminatorily discharged Negron and Ibarra, they are not entitled to reinstatement and backpay because they gave false testimony at the hearing. The record is unclear whether the Company urged this contention before the Board. Regardless of that fact, we believe the ALJ correctly concluded that the issue is one that would be resolved more appropriately at compliance proceedings. *See* Appendix of Petitioner at p. A-28.

noted that the first two sessions involved an exchange of proposals. The parties agreed to negotiation on non-economic positions before presenting economic proposals. The Company presented proposals which included a management rights clause, which was characterized by the Union's chief negotiator as the harshest management rights proposal he had ever seen, loss of seniority for failure to call in within two hours of the scheduled starting time, and no union security. By the sixth negotiating session, the parties had agreed on a few minor provisions, but remained in disagreement regarding the major non-economic issues. Following this session, the Union called in a federal mediator, who attended the remaining negotiating sessions. During the next three sessions, the Company proposed no union security unless the Union could prove that approximately ninety percent of the employees were members of the Union and the right of a Company official to accompany any union representative while present at the plant. The Company also proposed to limit the duration of the contract to one year. Agreement was reached on parts of the promotion, transfer, and holiday sections of the contract. After nine negotiating sessions, tentative agreement was reached on recognition and representation, military service, overtime and discrimination. At the tenth session on January 28, 1976, the Union presented its economic proposals in spite of the fact that all language proposals had not been resolved. The Company accepted Union proposals on dues check-off, arbitration, and a retention of the Company's profit-sharing plan. It rejected clauses relating to union security, management rights, and substantive employee benefits. The Company requested retention of its proposals on no-strike clause, no super seniority, its own hours of work provision, and its own pension and insurance plans. If offered three additional holidays and a shift premium, and accepted the Union's proposal on rest periods. It was not until six months later that the eleventh negotiating session was held. At this meeting the Union submitted a new management rights proposal and, in place of its union shop proposal, a maintenance of membership proposal.

The Company rejected both propositions and stated that its position of January 28 was final. Additionally, it fixed the expiration date of the contract at December 31, 1976—less than six months from the date of the eleventh session. At the final session on August 4, 1976, the Union announced its counterproposals.[5] The Company adhered to its July 14 proposal—the same proposal offered in January. The employee strike followed. The parties have held no further negotiating sessions. We believe that no more needs to be said; these facts support the Board's conclusion that the Company was not engag-

[5] The ALJ listed the Union's counterproposals as follows:

(1) the management rights clause as proposed by the Union on July 14; (2) the maintenance of membership clause as proposed by the Union on July 14; (3) check-off of dues as proposed by the Respondent (4) Respondent's no-strike, no lockout clause if the reference to international representative were striken; (5) Respondent's arbitration clause; (6) Union would drop the demand for super seniority for the shop committee: (7) Respondent's proposal on holidays for the first year of the contract, and the second year of the contract permit a full day off for the day before Christmas and the day before New Years, this would add one more holiday in the second year of the contract; (8) Respondent's vacation proposal; (9) shift premiums of 25 cents for the second shift and 35 cents for the third shift with all employees on those shifts receiving the premiums; (10) Respondent's hours of work proposals; (11) Respondent's profit-sharing plan would be discontinued as of January 1, 1977; (12) Respondent's present pension plan; (13) Respondent's present insurance plan paid in full by Respondent for all employees and their dependents; (14) a 25 percent wage increase for all employees as of August 1, 1976. The Union took the position that inasmuch as the election had occurred almost a year before, and while a 25 percent wage increase sounded like a lot, the Union was dropping Respondent's profit-sharing plan. The profit-sharing plan had paid off 20 percent the prior year, thus, the Union viewed this as an increased labor cost of 5 percent; (15) 10 minutes rest periods as proposed by Respondent without any time set for the rest periods; (16) wage increase of 40 cents across the board as of August 1, 1977, and another 40 cents across the board wage increase as of August 1, 1978, a 3-year contract to expire on July 31, 1979.

ing in hard bargaining, but instead was engaging in gamesmanship.

Petitioner insists it was merely seeking to preserve reasonable management prerogatives. The Company relies heavily on *NLRB v. Tomco Communications, Inc.*, 567 F.2d 1298 (5th Cir. 1978), and *Gulf States Manufacturers, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), in arguing that the basis of the Board's holding that the Company did not bargain in good faith was its disagreement with the substantive provisions of the Company's proposals on disputed items on which the parties could not agree. In both *Tomco* and *Gulf* there was evidence that the parties made bona fide concessions on many questions and agreements were reached on many disputed issues. Additionally, the employer in *Gulf* proved at trial that the same provisions and terms that were embodied in the Company's proposals had been accepted and approved by other unions, thereby refuting the allegation of an unreasonable bargaining stance.

In this case the Company failed to introduce evidence at the hearing that showed its extreme proposals were not unreasonable or irregular.[6] Furthermore, the transcripts of the negotiating sessions reveal that the Company made no significant concessions on issues that go to the heart of collective bargaining contracts.

We believe this case is more analagous to the case presented in *Wright Motors, Inc., supra.* In that case, the employer argued, as it does here, that its insistence on certain strict positions, including management rights and no-strike clauses, was merely hard bargaining. The Board found that the employer had engaged in surface

[6] The Company did produce the expert testimony of John Bacon, a vice-president of an employer association. Bacon testified to his definition of good faith bargaining and how it related to the case. The ALJ stated the testimony was irrelevant because Bacon "was not familiar with the totality of the negotiations and the circumstances of the same and in effect he was arriving at legal conclusions which was not his role." We cannot say this determination was arbitrary or an abuse of discretion.

bargaining. This court held that the employer's adherence to "unrealistically harsh positions" for six months in combination with its avoidance of bargaining on substantive economic matters provided substantial support for the Board's finding of a section 8(a)(5) violation. *Wright Motors, Inc., supra,* slip op. at 10. In so holding, the court recognized that neither the Board nor the courts should dictate the results of the bargaining process but stated:

> It is equally clear, however, that the Union has an enforceable right to good faith bargaining. . . . Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to . . . . The fact that it may be difficult to distinguish bad faith bargaining from hard bargaining cannot excuse our obligation to do so.

Wright Motors, Inc., supra, slip op. at 10 (citations omitted).

Thus, we conclude that the Company's unyielding rigidity to truculent proposals—including the short contract term, the management rights clause, no union shop, union access, and no general wage increase, and the avoidance of bargaining on substantial issues was substantial support for the Board to conclude that the Company violated section 8(a)(5) by engaging in bad faith bargaining.

III

Lastly, the Company objects to the finding by the Board that the Company unilaterally promulgated a new disciplinary rule regarding the wearing of safety glasses in violation of section 8(a)(5).

On May 16, 1977, during a safety meeting for employees in three of the Company's departments, a supervisor notified the employees that those who failed to wear safety glasses everywhere in the plant, with the exception of the cafeteria, would be suspended for a

week without pay. The record reveals that, according to past Company policy, employees were required to wear safety glasses only while operating machines or actually performing work. Additionally, testimony of two employees states that they had never before been informed that they would be disciplined for failure to wear safety glasses.

The Company argues that the supervisor's May 16 statement was not a subject of mandatory bargaining because the comment was not a formal management pronouncement but rather was an "angry outburst" to lax conditions in the plant. The company also supports its position with the fact that no steps had been taken by management to implement the policy. Petitioner has offered no authority for either of these arguments and we find them unpersuasive. The statement constituted a formal management rule, albeit oral, because it was uttered by a plant superintendent. Additionally, the fact that the rule had not been enforced at the time of the hearing—one month after the policy was announced—does not establish its non-existence. The ALJ noted that the Company neither disavowed its existence nor attempted to show that the rule has been rescinded. We believe there was sufficient evidence for the Board to conclude that the policy regarding safety glasses amounted to unilateral action in violation of section 8(a)(5).

Accordingly, the Company's petition to set aside the Board's order is denied. The Board's cross-petition for enforcement is granted.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

January 10, 1980

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

ELECTRI-FLEX COMPANY,
Petitioner,

No. 78-2506 vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the petitioner, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

ELECTRI-FLEX COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 78-2506

JUDGMENT

Before: Thomas E. Fairchild, Chief Judge, Luther M. Swygert, and Robert A. Sprecher, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the Electri-Flex Company, to review an order of the National Labor Relations Board issued against Petitioner, its officers, agents, successors and assigns on September 29, 1978, and upon the cross-application of the National Labor Relations Board to enforce said order. This Court heard argument of respective counsel on September 12, 1979, and has considered the briefs and transcripts of the record filed in this cause. On November 14, 1979, handed down its order denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Electri-Flex Company, Roselle, Illinois, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioner.

/s/ Luther M. Swygert
Chief Judge, United States Court of Appeals for the Seventh Circuit.

A True Copy:
Teste:

/s/ Krystine L. Juleen
Deputy Clerk of the United States
Court of Appeals for the
Seventh Circuit

U.S.C.A.—7th Circuit
Filed
January 28, 1980
Thomas F. Strubbe
CLERK

Supreme Court, U.S.
FILED
MAY 30 1980
JOSEPH F. SPANIOL, JR., CLERK

No. 79-1695

In the Supreme Court of the United States

OCTOBER TERM, 1979

ELECTRI-FLEX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 71-84) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 65-70) are reported at 238 N.L.R.B. No. 97.

JURISDICTION

The judgment of the court of appeals (Pet. App. 86-87) was entered on January 28, 1980. The petition for a writ of certiorari was filed on April 26,

1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner failed to bargain in good faith with the union and thereby violated Sections 8(a)(5) and (1) of the National Labor Relations Act.

STATEMENT

1. In June 1975, District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union") began an organizational campaign at petitioner's plant in Roselle, Illinois. On August 15, 1975, following a successful election, the Union was certified as the bargaining representative of petitioner's production and maintenance employees. Negotiations for a collective bargaining agreement began on September 26, 1975. During the course of 12 bargaining sessions in the next year, petitioner and the Union made limited progress toward an accord. Thus, the parties agreed to provisions regarding union recognition, representation, nondiscrimination, discipline, and bulletin boards, and also reached agreement on military leave, jury pay, and some aspects of the arbitration, seniority, promotion and transfer, layoff and recall, and overtime provisions. However, despite the Union's substantial concessions on economic and noneconomic issues, no cognizable progress was made as to the significan collective bargaining issues, because petitioner unwaiveringly insisted on a harsh management rights

clause, no union security, no real improvement in economic benefits, and a contract of short duration.[1] Accordingly, in August 1976, the Union went out on strike (Pet. App. 4-5, 48-53, 71-72, 79-83).

During the 11-month negotiating period, petitioner discharged and suspended several pro-union employees. Petitioner also threatened various other employees with reprisals because they supported the Union, interrogated a prospective employee about his union sentiments, and attempted to coerce those employees who peacefully picketed at petitioner's plant. In addition, petitioner promised an employee a raise if he would not attend a union meeting regarding a

[1] Petitioner proposed a management rights clause which vested in itself the exclusive right to direct, manage and control the plant and its working force, including the right to discipline, promote, transfer, and lay off employees; the right to schedule and change working hours; the right to assign and subcontract work; the right to modify or eliminate incentive wage plans; the right to make reasonable rules of conduct, safety, and operation; and the right to implement new production methods and products (G.C. Exh. 38). Petitioner opposed the Union's maintenance of membership, as well as union shop, proposals (Pet. App. 49-52; G.C. Exhs. 32(c), (k), 53).

Petitioner completely rejected any general wage increase and made a wage classification proposal which would have lowered wages for a number of employees if it had not agreed to "red-circle" existing wages (G.C. Exhs. 35, 43, 47, 51). What benefits the Company offered were to be paid only to current employees involuntarily transferred by the Company to the second or third shifts—or to employees with 20 years' tenure (Pet. App. 50-51; G.C. Exhs. 51, 32(k), 35). Finally at the final bargaining session, the Company insisted on a contract expiration date less than six months away (Pet. App. 50-51).

strike vote and thereafter did not give the employee the raise. Finally, petitioner unilaterally imposed a new disciplinary rule regarding the use of safety glasses without notifying or negotiating with the Union (Pet. App. 7-57).

2. a. In *Electri-Flex I* (228 N.L.R.B. 847 (1977), enforced, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978)), the court of appeals agreed with the Board that petitioner committed multiple unfair labor practices in violation of Sections 8(a)(1), (3), (4) and (5) of the Act, 29 U.S.C. 158(a)(1), (3), (4) and (5), during the course of the Union's election campaign and the initial contract negotiations. Among other things, the court found that petitioner discriminatorily discharged, transferred, or laid off five employees and coercively threatened and interrogated numerous others. 570 F.2d at 1331-1332, 1338-1339. The court further found that petitioner unlawfully and unilaterally instituted a written warning system in response to the employees' union activity and unilaterally implemented new call-in and probationary period rules. *Id.* at 1332-1338.

b. In this case, which focuses on the period between May 1976 (the Board's hearing in *Electri-Flex I*) and February 1978, the Board found that petitioner violated Section 8(a)(1) of the Act by threatening and coercing employees and a prospective employee with regard to their lawful support of the Union, including peaceful picketing (Pet. App. 6-15). The Board further held that petitioner violated Sections 8(a)(1), (3) and (4) of the Act by discharg-

ing six employees and suspending another because of their union activities or participation in Board proceedings (Pet. App. 16-25, 29-48), and that petitioner violated Sections 8(a)(1) and (3) of the Act by withholding a pay raise and suspending still another employee because of his union activities (Pet. App. 25-28). Finally, the Board determined that, in violation of Sections 8(a)(5) and (1) of the Act, petitioner unilaterally instituted a new disciplinary rule regarding enforcement of a safety regulation and bargained with the Union in bad faith. This latter conclusion was based on the totality of petitioner's conduct, including its pervasive unfair labor practices and " 'unyielding rigidity during negotiations,' " which showed that petitioner " 'only went through the elaborate motions of bargaining * * * with no sincere desire of reaching an agreement' " (Pet. App. 56, 57, 65-66).

After thoroughly reviewing the record, the court of appeals upheld the Board's findings and enforced its order (Pet. App. 72-84). With regard to the finding of bad faith bargaining, the court observed that "[t]he ALJ conducted an exhaustive examination of the evidence and concluded that [petitioner] engaged in sham bargaining. This conclusion is fully supported on the record" (*id.* at 79). The court further explained that petitioner's "unyielding rigidity to truculent proposals—including the short contract term, the management rights clause, no union shop, union access, and no general wage increase, and the avoidance of bargaining on substantial issues was

substantial support for the Board to conclude that the Company * * * engag[ed] in bad faith bargaining" (Pet. App. 83).

ARGUMENT

Petitioner no longer disputes that it committed numerous unfair labor practices since the last Board order (*Electri-Flex I*) was issued against it. Rather, its sole contention (Pet. 9-18) relates to the Board's finding that it bargained in bad faith. But whether an employer has bargained in "good faith" with the chosen representative of its employees, as required by Section 8(a)(5) of the Act, involves a largely factual determination based on an appraisal of the total conduct of the parties. See, *e.g.*, *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 498-499 (1960); *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952); *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring and dissenting). Here the court of appeals has affirmed the Board's findings in an extensive opinion upon which we rely. That decision does not conflict with any decision of this Court or of any court of appeals, and further review of the essentially factual question presented by petitioner is not warranted. *NLRB* v. *American National Insurance Co.*, *supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

In any event, the record fully supports the concurrent findings of the Board and the court of appeals.

See *NLRB* v. *Wright Motors, Inc.*, 603 F.2d 604, 608-610 (7th Cir. 1979). Petitioner unyieldingly insisted on extremely harsh provisions throughout the 11-month bargaining period despite substantial concessions by the Union during that same period. Thus, petitioner rigidly demanded a management rights clause—described by the Union's chief negotiator as the harshest he had ever seen (Pet. App. 49, 80)—which effectively reserved to it exclusive authority over all terms and conditions of employment. At the same time, petitioner refused to consider union security, a wage increase, or a contract of more than a year's duration. In contrast, the Union accepted or offered to accept several of petitioner's proposals, including a no-strike no-walkout clause, an arbitration clause, and various vacation, holiday and work hour proposals, and also agreed to withdraw its request for super seniority and a union shop. Moreover, throughout the negotiation period, petitioner committed numerous unfair labor practices designed to break the Union, including threats, interrogations, discharges, suspensions, and unilateral actions with regard to conditions of employment.

Petitioner erroneously contends (Pet. 10-12) that the court of appeals' decision is inconsistent with *Gulf States Manufacturers, Inc.* v. *NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd en banc, 598 F.2d 896 (1979), and *NLRB* v. *Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978). As the court of appeals pointed out (Pet. App. 82), however, those cases are readily distinguished on their facts. See

also *NLRB* v. *Wright Motors, Inc., supra,* 603 F.2d at 609. First, neither *Gulf States* nor *Tomco* involved extensive, contemporaneous unfair labor practices as was the case here. Moreover, in both cases, the employer had made substantial concessions on many questions and had not insisted on terms so harsh as to evidence bad faith. See 579 F.2d at 1320, 1326; 567 F.2d at 875, 877, 881-883.[2]

Finally, petitioner argues (Pet. 12-13, 16-18) that the Board and court of appeals improperly refused to consider its evidence concerning the reasonableness of its collective bargaining proposals. In fact, however, the Board considered the testimony of petitioner's expert witness, but found it lacking in weight, because that witness "was not familiar with the totality of the negotiations and the circumstances surrounding the same and in effect, he was arriving at legal conclusions which was not his role" (Pet. App. 56). The court of appeals found the Board's conclusion on this point to be neither "arbitrary [n]or an abuse of discretion" (*id.* at 82 n.6).[3]

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[2] Nor is the court's decision contrary to *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970). In that case, this Court invalidated a Board order that specifically required an employer to grant the union a checkoff provision to which the employer had not agreed during the course of collective bargaining. The Board's order in this case does not require petitioner to agree to any proposal; it simply orders petitioner to bargain in good faith (Pet. App. 63).

[3] Petitioner erroneously suggests (Pet. 16-17) that the court of appeals stated that petitioner "introduced no evidence that its proposals were reasonable and made no concessions during the contract negotiations." The court actually concluded that petitioner's evidence failed to demonstrate

Likewise, there is no merit to petitioner's contention regarding the admissibility of its wage surveys. The ALJ excluded this evidence as inadmissible hearsay (Tr. 1045, 1053-1055, 1057-1058), and petitioner failed to file an exception to that ruling before the Board. Accordingly, petitioner cannot now be heard to complain. See 29 U.S.C. 160(e); *Detroit Edison Co.* v. *NLRB,* 440 U.S. 301, 311 n.10 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that "its extreme proposals were not unreasonable or irregular" and "that [petitioner] made no significant concessions on issues that go to the heart of collective bargaining contracts" (Pet. App. 82).

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